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MODERN  
PLEADING AND PRACTICE  
IN EQUITY

IN THE

FEDERAL AND STATE COURTS OF THE UNITED STATES,  
WITH PARTICULAR REFERENCE TO THE  
FEDERAL PRACTICE,

INCLUDING

NUMEROUS FORMS AND PRECEDENTS.

BY

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# MODERN EQUITY PRACTICE.

## CHAPTER XVIII.

### NE EXEAT.

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§ 607. Nature and office of the writ.—The writ of *ne exeat republica* is a process issuing under the seal of a court of equity to prevent a person from leaving the State, or in a federal court from leaving the United States,<sup>1</sup> without the consent of the court.<sup>2</sup> Although originally a prerogative writ, it is now an ordinary process of the court, which issues as a matter of right in a proper case, and is resorted to for the purpose of obtaining equitable bail.<sup>3</sup>

<sup>1</sup> U. S. R. S., § 787; Loewenstein v. Johnson v. Clendennin, 5 Gill & J. Biernbaum, 8 W. N. C. 168. 463; Smedberg v. Mark's Ex'r, 6

<sup>2</sup> 2 Barbour's Ch. Pr. 647; 2 Daniell's Ch. Pr. (5th ed.) 1698; 1 Foster's Johns. Ch. 188; Sick v. Swinton, 1 Federal Practice (2d ed.), 261. Ves. & B. 372; Stewart v. Graham, 19 Ves. 312; Goodman v. Sayers, 5

<sup>3</sup> Gilbert v. Colt, Hopk. Ch. 496; Mad. Ch. 471; Grant v. Grant, 3 Russ. Mitchell v. Bunch, 2 Paige, 606; Gleason v. Bisby, Clarke's Ch. 551; Dunham v. Jackson, 1 Paige, 629; De Rivafiglioli v. Corsetti, 4 Paige, 264; 598; Cox v. Scott, 5 Har. & J. 898; Shearman v. Shearman, 8 Bro. C. C. 370; Adams v. Whitcomb, 46 Vt. 708, 712. "The writ of *ne exeat* as now



§ 608. Use and disuse of the writ.—It is generally held that a statutory or constitutional provision abolishing imprisonment for debt is not alone sufficient to deprive the court of chancery of the power to issue a writ of *ne exeat* in cases of equitable cognizance.<sup>1</sup> In Massachusetts Chief Justice Shaw, upon an *ex parte* hearing, inclined strongly to the opinion that in a proper case the supreme judicial court under its general chancery jurisdiction had authority to issue a writ of *ne exeat*.<sup>2</sup> And in a recent case in that court where the writ was denied under the circumstances, the authority to grant it was not disputed.<sup>3</sup> In Tennessee the writ, although fallen into disuse, is directly recognized by statute, and indirectly by the constitution.<sup>4</sup> Its use is abolished in New York,<sup>5</sup> Arkansas,<sup>6</sup> Ohio<sup>7</sup> and California.<sup>8</sup> A United States statute provides that

understood and practiced upon is a proceeding in equity to obtain bail in a case where there is a debt due in equity, though not at law, except in cases of account, and perhaps a few other cases of concurrent jurisdiction. The general rule is that where you can get bail at law equity will not grant the writ. In the exercise of this power courts of equity will be very cautious as it is a strong step tending to abridge the liberty of the citizen." *Rhodes v. Cousins*, 6 Rand. (Va.) 191. Chancellor Gibson says:—"Justice is dearer than the right to go abroad, and this writ should be awakened from its slumbers when it is necessary to prevent justice from being wrecked." *Gibson's Suits in Chancery*, § 889, n. 4. A *ne exeat* will not be allowed unless it is apparent from the bill that the performance of the decree in the suit in which it is applied for can be enforced against the person of the defendant, or the party against whom it is asked. *Gleason v. Bisby*, Clarke's Ch. 551; *Adams v. Whitcomb*, 46 Vt. 708, 712.

<sup>1</sup> See *Collins v. Collins*, 80 N. Y. 24; § 609, *infra*; *Dean v. Smith*, 23 Wis.

488; s. c., 99 Am. Dec. 198; *Gibson's Suits in Chancery*, § 888, and note 4, where the learned author says:—

"The decrees of the chancery court were formerly *in personam* and enforced by process of contempt, and imprisonment. The result was that, if the person of the defendant could not be reached, the decree could not be enforced, where the payment of money was ordered. Hence, the necessity of keeping the defendant within reach of the process of the court. But now that the chancery court can issue an execution against defendant's property, the writ of *ne exeat* is no longer necessary in ordinary cases."

<sup>2</sup> *Rice v. Hale*, 5 Cush. 288.

<sup>3</sup> *Moore v. Valda*, 151 Mass. 368.

<sup>4</sup> *Gibson's Suits in Chancery*, § 888; Code of Tennessee, § 4484; Constitution of Tennessee, art. VI, § 8; art. XI, § 1.

<sup>5</sup> § 609, *infra*.

<sup>6</sup> 16 Am. & Eng. Encyc. of Law, 374.

<sup>7</sup> *Cable v. Alvord*, 27 Ohio St. 654.

<sup>8</sup> *Ex parte Harker*, 49 Cal. 465. See, also, 16 Am. & Eng. Encyc. of Law, 374.

cess issued from a court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished." It has not been determined whether this is a limitation of the power to issue a writ of *ne exeat*.<sup>1</sup> The same statute further provides that "all modifications, conditions and restrictions upon imprisonment for debt provided by the laws of any State shall be applicable to the process issuing from the courts of the United States to be executed therein."<sup>2</sup> It has recently been held by Judge Lacombe, in the United States circuit court for the southern district of New York, in a case wherein the author ought to invoke the aid of the writ against a federal foreign minister, that the federal court had no authority to issue a *ne exeat* in New York, where imprisonment for debt and the writ itself are both expressly abolished by statute.<sup>3</sup>

§ 609. *Ne exeat* in New York.—It was held in New York that the act abolishing imprisonment for debt did not deprive the court of power to issue a writ of *ne exeat*.<sup>4</sup> The question whether the writ of *ne exeat* was abolished by the old New York code of procedure was much discussed, and the adjudications upon the point were conflicting. In the Supreme Court the power of the court to issue the writ was maintained, and the court acted upon that view of the law in numerous cases.<sup>5</sup> In the superior court of the city of New York the contrary view was entertained.<sup>6</sup> The court of appeals inclined to the opinion that the writ was not abolished.<sup>7</sup> The new code of civil procedure declares in terms that the writ of *ne exeat* is thereby abolished.<sup>8</sup>

§ 610. When a *ne exeat* will issue.—The writ of *ne exeat* is commonly granted upon a summary application to a judge

<sup>1</sup> U. S. R. S., § 990. See *Mallory Rogers v. Michigan &c. R. Co.*, 28 Mfg. Co. v. Fox, 30 Fed. Rep. 409. Barb. 589; *Glenten v. Clover*, 10 Abb.

<sup>2</sup> U. S. R. S., § 990.

<sup>3</sup> *Spencer v. Risley* (June, 1898), at Chambers; New York Code of Civil Procedure, § 548.

<sup>4</sup> *Brown v. Haff*, 5 Paige, 235; *Ashworth v. Wrigley*, 1 Paige, 301.

<sup>5</sup> *Forrest v. Forrest*, 5 How. Pr. 125; *Bushnell v. Bushnell*, 7 How. Pr. 389;

423; *Neville v. Neville*, 23 How. 500; *Breck v. Smith*, 54 Barb. 212; *Viadero v. Viadero*, 7 Hun, 818.

<sup>6</sup> *Fuller v. Emeric*, 2 Sandf. 626; *Johnston v. Johnston*, 1 Rob. 642.

<sup>7</sup> *Collins v. Collins*, 80 N. Y. 24, 26.

<sup>8</sup> Code of Civ. Pro., § 548; *Boucicault v. Boucicault*, 59 How. Pr. 134.

at chambers and an *ex parte* hearing, without the time for deliberation usually taken for the decision of important questions, and the authorities are therefore somewhat conflicting as to the practice in issuing the writ.<sup>1</sup> It must appear that there is a precise amount of debt positively due.<sup>2</sup> To warrant the issuing of a *ne exeat* there must be a debt or duty existing at the time, and so far mature that present payment or performance can rightfully be demanded; and this debt must be an equitable debt;<sup>3</sup> and, furthermore, an equitable demand, upon which the plaintiff cannot sue at law, except in some cases of concurrent jurisdiction, such as a balance due on accounts;<sup>4</sup>

<sup>1</sup> *Rice v. Hale*, 5 Cush. 288.

<sup>2</sup> *Gleason v. Bisby*, Clarke's Ch. 551.

<sup>2</sup> *Rhodes v. Cousins*, 6 Rand. (Va.) 191. The writ is never issued to enforce specific performance of an agreement except where there is a money demand to be enforced in equity. *Raynes v. Wyse*, 2 Mer. 478; *Blaydes v. Calvert*, 2 Jac. & W. 218; *Cable v. Alvord*, 27 Ohio St. 654. Nor to compel the defendant to abide the event of an action. *Gardner's Case*, 15 Ves. 445. It was said in *Cowdin v. Cram*, 3 Edw. Ch. 232, that whenever in a bill for specific performance the writ is allowed, it has been against the vendee where there is a money demand. In *Brown v. Haff*, 5 Paige, 289, the chancellor says that "to entitle the complainant to a writ of *ne exeat* he must show a demand actually due at the time of the writ issued." The writ was refused in *Cock v. Ravis*, 6 Ves. 288, "upon an undertaking for an indemnity; to obtain it there must be an equitable demand in the nature of a debt actually due." In *Gilbert v. Colt*, 1 Hopk. Ch. 500, it was said by the court that "according to the adjudged cases a positive affidavit of an existing debt is required as a foundation for the writ; and this rule has been observed with great strictness." *De Carrier v. De Callone*, 4 Ves. 577, and notes; *Dawson v. Dawson*, 7 Ves. 178.

See, also, *De Rivafinoli v. Corsetti*, 4 Paige, 264; *Sherman v. Sherman*, 8 Bro. C. C. 370; *Gibbs v. Mermand*, 2 Edw. Ch. 482; *Rico v. Guatree*, 3 Atk. 500; *Williams v. Williams*, 3 N. J. Eq. 180; *Mattocks v. Tremain*, 3 Johns. Ch. 75; *Seymour v. Hazard*, 1 Johns. Ch. 1; *Graham v. Stucken*, 4 Blatchf. 50, holding that the claim must be for a certain fixed sum of money and not for unliquidated damages; *Whitehouse v. Partridge*, 3 Swanst. 377, 378; *Porter v. Spencer*, 2 Johns. Ch. 169; *Morris v. McNeal*, 2 Russ. 604; *Malcolm v. Andrews*, 68 Ill. 101; *Hunter v. Nelson*, 5 Blatchf. (Ind.) 263; *Edwards v. Massey*, 1 Hawks (N. C.), 859; *Samuel v. Wiley*, 50 N. H. 353; *MacDonough v. Gaynor*, 18 N. J. Eq. 249. An allegation that the person against whom the writ is sought conspired to aid a debtor of the plaintiff to convey his property fraudulently to evade execution seems to be insufficient unless it shows that such property is held by the person whom it is desired to hold to bail. *Loewenstein v. Biernbaum* (1880), 8 W. N. C. 163. On an ordinary judgment creditor's bill, where an answer denies property and no proof is had to show any, a *ne exeat* cannot be had. *Palmer v. Van Doren*, 2 Edw. Ch. 425.

<sup>4</sup> 16 Amer. & Eng. Encyc. of Law,

and it must be shown that the defendant is about to leave the country to avoid payment.<sup>1</sup>

§ 611. The same subject continued.—A writ of *ne exeat* will issue only for an equitable demand, but it is no objection that the complainant may have relief at law, if the court of chancery has concurrent jurisdiction.<sup>2</sup> Hence it may be granted in a suit for an account,<sup>3</sup> or to recover the amount due upon a bond which has been lost,<sup>4</sup> or for specific performance,<sup>5</sup> although the defendant has other property than that which is the subject of the suit.<sup>6</sup>

§ 612. *Ne exeat* on bill for specific performance.—In a bill for specific performance of an agreement to purchase land, if it is evident that the complainant is in a situation to give a clear

376, 377, and cases cited. A writ of *ne exeat* is never issued in aid of legal as distinguished from equitable process, or for the purpose of obtaining security from a defendant in an action at law. *Moore v. Valda*, 151 Mass. 368; *Pearne v. Lisle*, *Ambler*, 75; *Greaves v. Stritho*, 2 Dick. 469; *Croasley v. Marriot*, 2 Dick. 609; *Ex parte Bunker*, 8 P. Wms. 313; *Brocker v. Hamilton*, 1 Dick. 154; *King v. Smith*, 1 Dick. 82; *Atkinson v. Leonard*, 8 Bro. C. C. 218; *Smedberg v. Mark*, 6 Johns. Ch. 183; *Palmer v. Van Doren*, 2 Edw. Ch. 425; *Ex parte Duncombe*, 1 Johns. Ch. 1; *Parker v. Appleton*, 8 Bro. C. C. 427; *Lucas v. Hickman*, 2 Stew. (Ala.) 11; *Victor Scale Co. v. Shurtleff*, 81 Ill. 813; *Ronesteel v. Bonesteel*, 28 Wis. 245; *Gresham v. Peterson*, 25 Ark. 377. A suit by a judgment and execution creditor to reach equitable interests and things in action is an equitable and not a legal demand, and the defendant may be arrested on a *ne exeat* therein. *Ellingwood v. Stevenson*, 4 Sandf. Ch. 366.

<sup>1</sup> *Graham v. Stucken*, 4 Blatchf. 50; *Mitchell v. Bunch*, 2 Paige, 606;

*Orme v. McPherson*, 36 Ga. 571; *Ramsay v. Joyce*, 1 McMull. Ch. (S. C.) 286; *Dean v. Smith*, 23 Wis. 483. It makes no difference that the party is going abroad in the course of his ordinary business. 2 *Daniell's Ch. Pr.* (5th ed.) 1704; *Stewart v. Graham*, 19 Ves. 318; *Dick v. Swinton*, 1 Ves. & B. 371; *Tomlinson v. Harrison*, 8 Ves. 32; *Etches v. Lance*, 7 Ves. 417; *Loyd v. Cardy*, Prec. in Ch. 171; *Baker v. Dumaresque*, 2 Atk. 66.

<sup>2</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1700.

<sup>3</sup> *MacDonough v. Gaynor*, 18 N. J. Eq. 249; *Jones v. Alephsin*, 16 Ves. 470; *Hannay v. M'Entire*, 11 Ves. 55; *Williams v. Williams*, 8 N. J. Eq. 180; *Jones v. Sampson*, 8 Ves. 598; *Howden v. Rogers*, 1 Ves. & B. 129; *Nixon v. Richardson*, 4 Desaus. 108; *Rhodes v. Cousins*, 6 Rand. 188. In matters of account it may be obtained by a defendant against a co-defendant. *Done's Case*, 1 P. Wms. 363; *Sobey v. Sobey*, L. R. 15 Eq. 200.

<sup>4</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1700; *Atkinson v. Leonard*, 8 Bro. C. C. 218.

<sup>5</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1701. See § 612, *infra*.

<sup>6</sup> *Boehm v. Wood, Turn. & R.* 333; *Goodwin v. Clarke*, 2 Dick. 497.

and perfect title to the premises, and that the defendant is wholly without excuse in refusing to complete the purchase, so that a specific performance must finally be decreed, the complainant is entitled to a *ne exeat* upon furnishing the usual evidence that the defendant intends to remove beyond the jurisdiction of the State.<sup>1</sup> But the complainant must show a demand actually due at the time the writ is issued. He must therefore show affirmatively at that time that he is able to make a clear and unincumbered title to the premises agreed to be sold.<sup>2</sup>

§ 613. *Ne exeat* to enforce alimony.—A *ne exeat* may issue upon a bill filed by a wife against her husband for alimony, unless its use for that purpose has been superseded by other statutory remedies.<sup>3</sup> In such cases, according to the English doctrine, the writ will not be granted until after a decree;<sup>4</sup> but a contrary rule was adopted in the New York court of chancery.<sup>5</sup> The writ must be prayed for in the bill<sup>6</sup> and the application supported by affidavit,<sup>7</sup> and issues only for arrears actually due.<sup>8</sup>

§ 614. *Against whom the writ may issue.*—It is not essential to ground an application for the writ that the defendant should be actually in the State when the application is made,<sup>9</sup> and the writ may issue against a foreigner or citizen

<sup>1</sup> Goodwin v. Clarke, 2 Dick. 497; Haffey v. Haffey, 14 Ves. 261; Dawson v. Wood, Turn. & Russ. 332. It is no objection that the land is without the State. Enos v. Hunter, 9 Ill. 211.

<sup>2</sup> Brown v. Haff, 5 Paige, 235; Morris v. McNeil, 2 Russ. 604.

<sup>3</sup> Denton v. Denton, 1 Johns. Ch. 264; Bushnell v. Bushnell, 15 Barb. 399; 16 Amer. & Eng. Encyc. of Law, 378; McGee v. McGee, 8 Ga. 295; Devall v. Devall, 4 Des. 79; Kirby v. Kirby, 1 Paige, 261; Lyon v. Lyon, 21 Conn. 185, 199, note; Yule v. Yule, 2 Stockt. 188; Prather v. Prather, 4 Des. 88; Bayly v. Bayly, 2 Md. Ch. 326; Forrest v. Forrest, 10 Barb. 96.

<sup>4</sup> Street v. Street, 1 Turn. & R. 323;

<sup>5</sup> Denton v. Denton, 1 Johns. Ch. 364, 441, per Chancellor Kent; Bushnell v. Bushnell, 15 Barb. 399; Forrest v. Forrest, 10 Barb. 46. See, also, Yule v. Yule, 10 N. J. Eq. 138.

<sup>6</sup> Reed v. Reed, 1 Ch. Cas. 115; Shaftoe v. Shaftoe, 7 Ves. 71; Dawson v. Dawson, 7 Ves. 178.

<sup>7</sup> Coglar v. Coglar, 1 Ves. Jr. 94, and cases cited in the preceding note.

<sup>8</sup> Haffey v. Haffey, 14 Ves. 261; Augier v. Angier, Prec. Ch. 497; Bailey v. Cadwell, 51 Mich. 217.

<sup>9</sup> Parker v. Parker, 12 N. J. Eq.

of another State and on demands arising abroad.<sup>1</sup> The writ will not be issued against a *feme covert* administratrix;<sup>2</sup> nor against a married woman in suits affecting her separate estate;<sup>3</sup> nor against a defendant under arrest or held to bail in an action at law.<sup>4</sup> United States senators and representatives are privileged from arrest on civil process while attending, going to or returning from a session of congress,<sup>5</sup> and the United States Revised Statutes extend a similar protection to the ministers of foreign States and their domestic servants.<sup>6</sup>

**§ 615. Application for ne exeat.**—The writ of *ne exeat* may be applied for at any stage of the suit<sup>7</sup> after the bill is filed.<sup>8</sup> It may be applied for by petition, but is usually granted upon motion and affidavit.<sup>9</sup> The application may be *ex parte*, for “surely in vain the net is spread in the sight of

105; *McDonough v. Gaynor*, 18 N. J. Eq. 249, and cases cited. In New Jersey the statute requires that there shall be satisfactory proof to the chancellor that the defendant designs quickly to depart out of the State.

<sup>1</sup> *Mitchell v. Bunch*, 2 Paige, 606, a suit between two foreigners; *Woodward v. Schatzle*, 8 Johns. Ch. 412; *Gilbert v. Colt*, Hopk. Ch. 496; *Parker v. Parker*, 12 N. J. Eq. 105; *Flack v. Holm*, 1 J. & W. 405; *De Carriere v. De Calonne*, 4 Ves. 577; *Forrest v. Forrest*, 5 How. Pr. 125; *McNamara v. Dwyer*, 7 Paige, 287.

<sup>2</sup> *Pannell v. Taylor*, Turn. & Russ. 96.

<sup>3</sup> *Moore v. Meynell*, 1 Dick. 180; *Moore v. Hudson*, Mad. & Geld. 218.

<sup>4</sup> *Raynes v. Wyse*, 2 Mer. 472.

<sup>5</sup> U. S. Const., art. 1, § 6.

<sup>6</sup> U. S. R. S., §§ 4063, 4064, 4065, 4066; *United States v. Lafontaine*, 4 Cranch, C. C. 173; *United States v. Benner*, Baldwin, 284; *Ex parte Cabrera*, 1 Wash. C. C. 282.

<sup>7</sup> *Dunham v. Jackson*, 1 Paige, 629. See, also, § 618, *infra*.

<sup>8</sup> *Ex parte Bruncker*, 3 P. Wms. 812; *Hughes v. Ryan*, 1 Beat. 327; *Mat-*

*stocks v. Tremain*, 8 Johns. Ch. 75. See § 616, *infra*. Under the same bill a *ne exeat* as well as an injunction may be granted. *Bryson v. Petty*, 1 Bland, 182. Where the defendant is arrested on a *ne exeat* and the complainant takes out a subpoena and makes a *bona fide* attempt to serve it, but is unable to do so in consequence of the defendant's departure from the state, the want of service of the subpoena will not render the service of the *ne exeat* irregular, nor afford any ground for discharging the writ. *Georgia Lumber Co. v. Bissell*, 9 Paige, 225.

<sup>9</sup> 2 Daniell's Ch. Pr. (5th ed.) 1706, and n. 5. A prayer for the writ in the bill is not necessary except in the federal courts where the writ is desired “pending the suit,” although it is usually inserted. 2 Daniell's Ch. Pr. (5th ed.) 1705; § 618, n. 5, *infra*; United States Equity Rule 21. Nor is an amendment necessary to support an application in the progress of the cause. *Gilbert v. Colt*, Hopk. Ch. 498; 1 Hoffman's Ch. Pr. 91; 2 Barbour's Ch. Pr. (2d ed.) 648.

any bird."<sup>1</sup> It must be supported by an affidavit entitled in the cause,<sup>2</sup> and made by the complainant or some person conversant with the facts.<sup>3</sup>

§ 616. *No exeat* before bill filed.—According to the English rule neither a writ of *ne exeat* nor an injunction could be properly granted on affidavits made before a cause or other proceeding was actually pending in court, or if granted was subject to discharge or dissolution as having been irregularly obtained.<sup>4</sup> And the reason was that if the writ had been procured by testimony wilfully and corruptly false, the person giving it could not be convicted of perjury, as he had not given it in a suit or proceeding in court.<sup>5</sup> These reasons having ceased to exist in New Jersey in consequence of statutory provisions, it was recently held by Vice-Chancellor Van Fleet that the writ of *ne exeat* may be granted before a suit is pending between the parties.<sup>6</sup>

§ 617. The same subject continued — The United States statute.—The United States Revised Statutes provide that "writs of *ne exeat* may be granted by any justice of the Supreme Court in cases where they might be granted by the circuit court of which he is a judge. But no writs of *ne exeat*

<sup>1</sup> Prov. I, 17; *Collinson v. —*, 18 Ves. 453; *Samuel v. Wiley*, 50 N. H. 355; *Elliott v. Sinclair*, Jac. 545.

<sup>2</sup> *Barbour's Ch. Pr.* (2d ed.) 649. The affidavits should not be sworn until the bill is filed. *Anon.*, 6 Mad. 276; *Francome v. Francome*, 11 Jur. (N. S.) 128. If an answer has been filed it may be used in support of the application in aid of an insufficient affidavit. *Gilbert v. Colt*, Hopk. Ch. 500. To sustain a writ of *ne exeat* sufficient equity must appear on the face of the bill. A mere apprehension that the defendant will misapply funds in his hands or abuse his trust is not sufficient. *Woodward v. Schatzall*, 3 Johns. Ch. 412.

<sup>3</sup> 16 Amer. & Eng. Encyc. of Law, 380; *Dawson v. Dawson*, 7 Ves. Jr. 173; *McGee v. McGee*, 8 Ga. 295. It

may be made by the committee of a lunatic (*Stewart v. Graham*, 19 Ves. 316); or by an infant of the age of eighteen years. *Roddam v. Hetherington*, 5 Ves. 91.

<sup>4</sup> This rule was followed by Chancellor Halstead in *Bylandt v. Bylandt*, 6 N. J. Eq. 28. See, also, *Mattocks v. Tremain*, 3 Johns. Ch. 75. For the English cases see *Anon.*, 6 Madd. 277; *Francome v. Francome*, 11 Jur. (N. S.) 128; *Hughes v. Ryan*, Beat. 327. In *Ex parte Bruncker*, 3 P. Wms. 312, Lord Talbot said that in all his experience he never knew the writ granted or taken out without a bill in equity first filed.

<sup>5</sup> See *State v. Dayton*, 28 N. J. Law, 49, 54.

<sup>6</sup> *Clark v. Clark* (N. J. Ch.), 26 Atl. Rep. 1012.

shall be granted unless a suit in equity is commenced and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States."<sup>1</sup> An allegation that the defendant intends to withdraw from the judicial district in which the application is made is not sufficient.<sup>2</sup>

§ 618. *Ne exeat* on final decree.—According to Mr. Daniell and many other authorities a prayer in the bill for a *ne exeat* is not necessary.<sup>3</sup> The writ is not a mere provisional remedy, the right to which expires upon the determination of the suit and the entry of judgment. The very object of the remedy is to secure the presence of the party in order that the judgment may be executed. It is not discharged any more than an attachment is discharged upon the entry of judgment.<sup>4</sup> The writ may be granted in the final decree, and should continue in force until the judgment is satisfied, or until the writ is dissolved or proper security given.<sup>5</sup>

§ 619. *Affidavit of indebtedness*.—The affidavit to authorize the writ must be as positive in respect of the equitable debt as an affidavit of a legal debt to hold to bail.<sup>6</sup> There is an ex-

<sup>1</sup> U. S. R. S., § 717.

<sup>2</sup> Loewenstein v. Biernbaum (1880), 8 W. N. C. 163.

<sup>3</sup> 2 Daniell's Ch. Pr. (5th ed.) 1705; Dunham v. Jackson, 1 Paige, 629; Gilbert v. Colt, 14 Am. Dec. 561, n.; Collinson v. —, 18 Ves. 353. See § 28, *supra*; Lewis v. Shainwald, 48 Fed. Rep. 492, 500.

<sup>4</sup> Lewis v. Shainwald, 48 Fed. Rep. 492, 499, 500.

<sup>5</sup> Lewis v. Shainwald, 48 Fed. Rep. 492; Mitchel v. Bunch, 2 Paige, 606; McNamara v. Dwyer, 33 Am. Dec. 631. Where the decree restrained the defendant from departing from the jurisdiction, but specified no limit of time, the appellate court recommended the addition of the words "until the satisfaction of the decree or the further order of the court." Lewis v. Shainwald, 48 Fed. Rep. 492,

500, holding also that under United States Revised Statutes, section 716, a United States district court has power to issue writs of *ne exeat*. But there is a distinction herein between the *judge* and the *court*, the former having no authority. Gernon v. Boecaline, 2 Wash. C. C. 180; Lewis v. Shainwald, *supra*. United States Equity Rule 21, requiring a special prayer for a *ne exeat*, is expressly limited to cases where the writ is asked for "pending the suit."

<sup>6</sup> Jackson v. Petrie, 10 Ves. 163; 2 Daniell's Ch. Pr. (5th ed.) 1706; Darley v. Nicholson, 1 Dr. & W. 66; Holliday v. Hiodan, 25 Ga. 629; Gernon v. Boecaline, 2 Wash. 180; Sherman v. Sherman, 3 Bro. C. C. 370; Yale v. Yale, 10 N. J. Eq. 188. An affidavit will be dispensed with if the debt appears from the master's report



ception in the case of an account, where the plaintiff must swear positively to a debt or balance due him from the defendant; yet he need not swear to a certain sum, but according to his belief as to the amount.<sup>1</sup>

§ 620. *Affidavit of intention to depart.*— There must be a positive affidavit of a threat or purpose of the party against whom the writ is prayed to go abroad,<sup>2</sup> and that the debt would be lost or at least in danger by his departure from the State.<sup>3</sup>

to be due, and such report has been confirmed. *Collinson v. —*, 18 Ves. 353; *Etches v. Lance*, 7 Ves. Jr. 417.

<sup>1</sup>*Thorne v. Halsey*, 7 Johns. Ch. 189; *Rico v. Gaultier*, 3 Atk. 501; *Clayton v. Milton*, 1 Del. Ch. 32; *Redman v. Hetherton*, 5 Ves. Jr. 91; *Jackson v. Petrie*, 10 Ves. 164; *Gerron v. Boecaline*, 2 Wash. C. C. 130; *MacDonough v. Gaynor*, 18 N. J. Eq. 249. See, also, *Thompson v. Smith*, 11 Jur. (N. S.) 276. "The general rule of practice to be gathered from the cases we think is that the writ is to be granted only in a case of equitable ascertained debt to which affidavit can be made with a good degree of certainty; or when it can be shown by or reference to accounts or to other authorized documents to the reasonable satisfaction of the court that something in the nature of an ascertainment of a debt has taken place whereupon a debt arises. But we think that the writ is not grantable when the account is open and unliquidated, although the plaintiff states in his affidavit that a certain sum is due. Such an allegation, although in terms a statement of fact, that is, of the defendant's actual indebtedness, must nevertheless be qualified by the subject-matter to which it relates; and where it relates to a long unliquidated account or to

facts which are future and contingent, it can amount to nothing more than a strong declaration of a confident expectation or belief, and is not a sufficient ground for issuing the writ unless it is accompanied and supported by proper accounts or documents." Per Shaw, C. J., in *Rice v. Hale*, 5 Cussh. 333.

<sup>2</sup>*Mattocks v. Tremain*, 3 Johns. Ch. 75; *Rhodes v. Cousins*, 6 Rand. (Va.) 188; a. c., 18 Am. Dec. 715; *Anon.*, 2 Ves. Sr. 439; *Amsinck v. Barklay*, 8 Ves. 597; *Sherman v. Sherman*, 8 Bro. C. C. 370; *Orme v. McPherson*, 36 Ga. 571; *Hyde v. Whitfield*, 19 Ves. 342; *Yale v. Yale*, 10 N. J. Eq. 138; *Oldham v. Oldham*, 7 Ves. 410; *Houseworth v. Hendrickson*, 27 J. Eq. 60; *Gresham v. Peterson*, 25 Ark. 377; *Moore v. Gleaton*, 23 Ga. 142; *Woods v. Symmes*, 25 Ga. 69; *Forrest v. Forrest*, 10 Barb. 46; *Etches v. Lance*, 7 Ves. 417. It will be sufficient if the defendant's declaration of intention is sworn to on information from members of his family. *Collinson v. —*, 18 Ves. 353, holding that the affidavit may be made by a third person.

<sup>3</sup>*Mattocks v. Tremain*, 3 Johns. Ch. 75. It is not necessary, however, to state that the defendant's object in leaving is to avoid the jurisdiction. *Etches v. Lance*, 7 Ves. 417; *Tomlinson v. Harrison*, 8 Ves. 32;

§ 621. Allowance and indorsement of the writ.—The applicant for the writ may be required to give an undertaking to abide by any order the court may make as to damages.<sup>1</sup> The writ must be marked on the back, in words at length, with the amount for which the defendant is to give security.<sup>2</sup> The court determines the amount in which the defendant shall be held to bail, and the sheriff must take a bond in the amount directed as the penal sum, without any addition.<sup>3</sup> The court should mark the writ in a sum sufficient to cover not only the existing debt but a reasonable amount of future interest, having regard to the probable duration of the suit.<sup>4</sup> Where the writ is issued against a personal representative, at the instance of a legatee or person claiming a share of the residue, it must be marked for the whole amount due from the defendant, not to the plaintiff only, but to all the other persons interested in the estate.<sup>5</sup> If the writ is actually marked by the clerk, it will be presumed to have been so done in pursuance of the order of the court.<sup>6</sup>

§ 622. Service of the writ.—The writ is delivered to the proper officer, directing him to cause the party personally to come before him and give sufficient bail or security in the amount indorsed on the writ, conditioned that the party will not depart from the State without the permission of the court,<sup>7</sup> and upon refusal to commit the party to prison.<sup>8</sup> The officer is

*Rhodes v. Cousins*, 6 Rand. (Va.) 188; *See, also, Gleason v. Bisby*, 1 Clarke's Stewart v. Graham, 19 Ves. 818; Atkinson v. Leonard, 8 Bro. C. C. 218; Boehm v. Wood, Turn. & R. 382; Ch. 551; Boehm v. Wood, 1 Turn. & R. 382; Denton v. Denton, 1 Johns. Ch. 441; McNamara v. Dwyer, 7 Paige, 289. If it is indorsed for too large a sum, the court will not quash the writ, but will require security only to the proper amount. *Pannell v. Tayler*, Turn. & Russ. 100; *Grant v. Grant*, 8 Russ. 598.

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1709. Upon discharging the writ the court may direct a reference to ascertain the damages, and order payment thereof. *Sichel v. Raphael*, 4 L. T. (N. S.) 114.

<sup>2</sup> Beames on Ne Exeat, 98; 2 Daniell's Ch. Pr. (5th ed.) 1709.

<sup>3</sup> *Gilbert v. Colt*, Hopk. Ch. 496.

<sup>4</sup> *Gilbert v. Colt*, Hopk. Ch. 500.

<sup>5</sup> 3 Daniell's Ch. Pr. (1st ed.) 893; *Pannell v. Tayler*, Turn. & Russ. 100.

<sup>6</sup> *Gleason v. Bisby*, Clarke's Ch. 551; *Viadero v. Viadero*, 7 Hun, 813.

<sup>7</sup> 2 Barbour's Ch. Pr. (2d ed.) 654; *De Carriere v. Calonne*, 4 Ves. 577.

<sup>8</sup> 3 Daniell's Ch. Pr. (1st ed.) 894.

not authorized to break open doors to serve the process,<sup>1</sup> but the party is not entitled to discharge on account of such abuse.<sup>2</sup> A writ of *ne exeat* was declared void for service on Sunday, and bond given thereon ordered to be canceled.<sup>3</sup> The officer serving the writ is the sole judge of the sufficiency of the sureties offered, as he acts upon his own responsibility.<sup>4</sup> Where bail is taken and the party leaves the State, the court will allow the officer a reasonable time to produce him; or, in case he cannot be produced, a reasonable time to prosecute the bond and recover the amount which the officer is ordered to pay.<sup>5</sup> After executing the writ the officer should make a return of his doings.<sup>6</sup>

§ 623. *Obligation of sureties.*—The object and design of a writ of *ne exeat* as used by courts of chancery is to hold the party against whom it is issued amenable to justice and to render him personally responsible for the performance of their orders and decrees. The obligations devolved upon the sureties entering into the bond bear a close resemblance to the duties and responsibilities of bail at common law. So soon as the defendant is in custody under the final decree, the bond has performed its office and the responsibility of the sureties is at an end,<sup>7</sup> and they are not liable for his subsequent escape.<sup>8</sup>

§ 624. *Discharging a ne exeat.*—After the party is arrested upon a *ne exeat* he may apply to the court by motion or petition, and on notice to the opposite party, for an order to discharge the writ.<sup>9</sup> If security has been given the appli-

<sup>1</sup> Beames on Ne Exeat, 95.

<sup>2</sup> 8 Daniell's Ch. Pr. (1st ed.) 894.

<sup>3</sup> Jewett v. Bowman, 27 N. J. Eq. 275.

<sup>4</sup> 2 Barbour's Ch. Pr. (3d ed.) 654: Boehm v. Wood, Turn. & Russ. 840, holding that he may take a deposit as security.

<sup>5</sup> Brayton v. Smith, 6 Paige, 489.

<sup>6</sup> 8 Daniell's Ch. Pr. (1st ed.) 896; Bonner v. Worthington, cited in Beames on Ne Exeat, 97.

<sup>7</sup> In Debazin v. Debazin, 1 Dick. 95, the defendant being in contempt and

in custody for not performing the decree, the sureties applied and obtained an order that they should be discharged and the bond as to them canceled.

<sup>8</sup> Johnson v. Clendenin, 5 Gill & J. 468.

<sup>9</sup> 2 Barbour's Ch. Pr. (3d ed.) 655. Where the defendant in a *ne exeat* cannot give such security as will satisfy the sheriff, or wishes to leave the State before the termination of the suit, his course is to apply to the court for a discharge of the writ, upon giving

cation should also pray that the bond be given up.<sup>1</sup> If the application is upon the ground that the writ was irregularly or improperly granted it may be made before answer, and may be supported by affidavit.<sup>2</sup> The application must be made within a reasonable time.<sup>3</sup> Where it was not made until the cause was noticed for final hearing it was refused.<sup>4</sup> A defendant against whom there is *prima facie* evidence of being guilty of a breach of an injunction cannot be heard upon a motion to discharge a *ne exeat* against him in the same cause until he has purged himself of the contempt.<sup>5</sup>

§ 625. The same subject continued.—It is a matter of course to discharge a *ne exeat* upon the defendant's giving security to answer the complainant's bill where a discovery is necessary, and to abide such order and decree as may be made in the cause and to render himself amenable to the process of the court which may be issued to enforce its performance.<sup>6</sup> Affidavits may be read both in support of and against the motion to discharge the writ.<sup>7</sup> It is open to the defendant by affidavits to deny the allegations on which the writ was founded.<sup>8</sup> The defendant is entitled to the benefit if his sworn answer to the charges of the bill upon which a *ne exeat* issued,<sup>9</sup>

sufficient security, etc. *Brayton v. Smith*, 6 Paige, 489.

<sup>1</sup> Daniell's Ch. Pr. (1st ed.) 896. The giving usual security to the sheriff upon a *ne exeat* does not preclude the defendant from applying, upon the bill only, or upon the coming in of the answer, to have the writ discharged and the bond to the sheriff given up and canceled. *Jessup v. Hill*, 7 Paige, 95.

<sup>2</sup> *Grant v. Grant*, 8 Russ. 598, 602. See, also, *Hyde v. Whitfield*, 19 Ves. 342; *Flack v. Holm*, 1 Jac. & W. 414; *Cary v. Cary*, 39 N. J. Eq. 8.

<sup>3</sup> *Harris v. Hardy*, 8 Hill, 393; *Miller v. Miller*, 1 N. J. Eq. 386.

<sup>4</sup> *Miller v. Miller*, 1 N. J. Eq. 386.

<sup>5</sup> *Evans v. Van Hall*, Clarke's Ch. 22 holding that upon a motion to discharge a *ne exeat* affidavits show-

ing that there has been a breach of the injunction issued with it, by the defendant, will be heard, to enable the court to judge whether the defendant is in contempt.

<sup>6</sup> *Mitchell v. Bunch*, 2 Paige, 606; *McNamara v. Dwyer*, 7 Paige, 229; *Gleason v. Bisby*, Clarke's Ch. 551; *Georgia Lumber Co. v. Bissell*, 9 Paige, 225. An immaterial amendment of the bill does not discharge the writ. *Grant v. Grant*, 5 Russ. 189.

<sup>7</sup> *Flack v. Holm*, 1 Jac. & W. 414.

<sup>8</sup> *Cowdin v. Crane*, 3 Edw. Ch. 281.

<sup>9</sup> *Jewett v. Bowman*, 27 N. J. Eq. 275; *Gilbert v. Colt*, Hopk. Ch. 496. Upon a motion to discharge a *ne exeat* upon the defendant's answer, affidavits to sustain the bill and contradict the answer will not be heard. *Evans v. Van Hall*, Clarke's Ch. 22.

although the time for filing exceptions to it has not expired.<sup>1</sup> Where the defendant for his own convenience applies to the court and gives the usual bond, without asking to reserve the right of applying to cancel the bond, the right to raise the question as to the propriety of holding him to bail originally will be deemed to be waived.<sup>2</sup> Where the affidavit of the complainant and the answer of the defendant taken together made a strong *prima facie* case that nothing was due from the defendant, the writ was discharged.<sup>3</sup> A *ne exeat* obtained upon affidavits substantiating declarations and acts of the defendant as evidence of his intention to depart the State will not be discharged upon a counter-affidavit by the defendant denying the intention.<sup>4</sup> The writ will be discharged if the sum in which it is marked is paid into court,<sup>5</sup> although a larger sum is reported due by the master.<sup>6</sup> On an application to discharge a writ of *ne exeat* where a defendant has taken the benefit of an insolvent act, the court will consider the discharge under such act as regular and will not look into suggested fraud and informality in obtaining it.<sup>7</sup>

§ 626. Terms of discharge — Enforcement of bond. — In cases where the court feels constrained to discharge the writ it will often require security to abide the decree.<sup>8</sup> The chancellor has power to determine both the fact and extent of liability of sureties upon a *ne exeat* bond, and will therefore refuse to order the sheriff to assign the bond to the complainant

<sup>1</sup> Thorne v. Halsey, 7 Johna. Ch. 189.

<sup>2</sup> Jesup v. Hill, 7 Paige, 95.

<sup>3</sup> Leo v. Lambert, 3 Russ. 417.

<sup>4</sup> Houseworth v. Hendrickson, 27 N. J. Eq. 60; Breck v. Smith, 54 Barb. 212; Glenton v. Clover, 10 Abb. 422. See, also, Russell v. Ashby, 5 Ves. 98; Myer v. Myer, 25 N. J. Eq. 28.

<sup>5</sup> Evans v. Evans, 1 Ves. Jr. 86; Stewart v. Stewart, 19 Ves. 314.

<sup>6</sup> Baker v. Jefferies, 2 Cox's Cas. 226.

<sup>7</sup> O'Connor v. Debraine, 3 Edw. Ch. 280.

<sup>8</sup> MacDonough v. Gaynor, 18 N. J. Eq. 249; Parker v. Parker, 12 N. J. Eq. 105; Houseworth v. Hendrick-

son, 27 N. J. Eq. 61. Security to abide by and perform the decree may be required. Griswold v. Hazard, 141 U. S. 260, 281. A *captas*, where a *ne exeat* should have been sued out and a bond taken thereon, simply to appear at court in the cause on the first day of the next term, is irregular and will be set aside. But the order being right, the defendants were ordered to give bond with security to answer and abide the decree of the court. Upon these terms the writ and bond were set aside with costs. MacDonough v. Gaynor, 18 N. J. Eq. 249.

for prosecution.<sup>1</sup> The order discharging the writ ought also to restrain the person against whom it was issued from bringing an action for false imprisonment.<sup>2</sup> If the writ is discharged another may be sued out upon a fresh affidavit.<sup>3</sup>

<sup>1</sup> *Wauters v. Van Vorst*, 28 N. J. Eq. 86; 2 *Daniell's Ch. Pr.* (5th ed.) 108. 1714.

<sup>2</sup> *Darley v. Nicholson*, 2 Dr. & War. <sup>3</sup> *Gernon v. Boecaline*, 2 Wash. 180.

## CHAPTER XIX.

### HEARING.

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| <p>§ 627. Bringing on a hearing.</p> <p>628. The same subject continued.</p> <p>629. Application for continuance.</p> <p>630. Condition of the case as to defendants.</p> <p>631. How a cause is heard.</p> <p>632. Right to open and close.</p> <p>633. Hearing without pleadings.</p> <p>634. Hearing on bill and unsworn answer.</p> <p>635. Status of interlocutory orders.</p> <p>636. Rules controlling the decision — Law of the case.</p> <p>637. Hearing on bills of interpleader.</p> <p>638. Proceedings on bills of interpleader.</p> | <p>§ 639. Objections at the hearing.</p> <p>640. The same subject continued — Adequate remedy at law.</p> <p>641. Dismissal upon the answer.</p> <p>642. Dismissal of bills alleging joint cause of action.</p> <p>643. Dismissals without prejudice.</p> <p>644. Effect of dismissal without prejudice.</p> <p>645. Effect of absolute dismissal.</p> <p>646. Dismissal for want of prosecution.</p> <p>647. Retaining a cause for further relief.</p> <p>648. Retaining a cause to await action at law.</p> |
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§ 627. Bringing on a hearing.—By the English practice the plaintiff must set down the cause for hearing within four weeks after the evidence is closed, or upon his neglect the defendant may have the bill dismissed for want of prosecution. If the plaintiff desires to set down the cause upon bill and answer he must do so within the time that is allowed him for filing replication; that is, within four weeks after the answer.<sup>1</sup> In this country the practice is regulated by statute or rules of court, and is not uniform even in the federal circuit courts.<sup>2</sup> A party cannot notice a cause for hearing by antici-

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 964.

<sup>2</sup> See *Electrolibration Co. v. Jackson*, 52 Fed. Rep. 773; § 274, *supra*; 1 Foster's Federal Practice (2d ed.), § 296. The statutory provision in New Jersey which requires that every cause should be set down for hearing at the next stated term after the filing of the replication renders the Eng-

lish practice in such case inapplicable. *West v. Paige*, 9 N. J. Eq. 208. A matter disposed of by the vice-chancellor before final hearing will be supposed to have been duly set down for hearing, and on the final hearing will not be reheard as a matter of course. *Hurlbut v. Hut-ton*, 42 N. J. Eq. 15.

pation. If a suit be waiting for a report it cannot, merely because such report may be obtained before the cause can be heard, be put upon a calendar for a hearing.<sup>1</sup> Where the court permitted a demurrer to be incorporated in an answer, it was held that the demurrer must be brought to a hearing before a trial on the merits.<sup>2</sup> A defendant who has appeared by a solicitor is entitled to notice of the hearing, although he has suffered the bill to be taken as confessed;<sup>3</sup> otherwise where the bill is taken as confessed for want of an appearance.<sup>4</sup> Where a cross-bill has been filed, and after both causes are at issue or in a situation to be heard, the complainant in the cross-suit may have an order that they be heard together.<sup>5</sup> A party is entitled to only one hearing on the merits. He cannot split up defenses and try each defense separately.<sup>6</sup> When a suit in equity has been heard, neither party has a right to file any paper in the cause except by leave of court.<sup>7</sup>

§ 628. The same subject continued.—Although a statute requires that a bill shall stand for hearing at the next term after replication filed, yet there is no error in setting the cause for hearing at the same term if the parties do not object.<sup>8</sup> A defendant who is present by his counsel, and takes part in the hearing of the cause on the day set for hearing without objection that it had been prematurely set, waives his right to further time in which to take proofs, though the hearing was in fact before the expiration of the time allowed by law for the taking of proofs after answer filed.<sup>9</sup> The Virginia code<sup>10</sup> provides that at any time before

<sup>1</sup> *Mix v. Mackie*, 2 Edw. Ch. 426. Where a decree reserves further directions and equity until the coming in of the master's report, the cause should be set down for hearing on the equity reserved. *Ruckman v. Decker*, 28 N. J. Eq. 5.

<sup>2</sup> *Holt v. Daniels*, 61 Vt. 89, 98.

<sup>3</sup> *Hart v. Small*, 4 Paige, 551. See, also, *Cook v. French* (Mich.), 56 N. W. Rep. 101.

<sup>4</sup> *Wager v. Stickie*, 8 Paige, 407.

<sup>5</sup> *White v. Buloid*, 2 Paige, 164.

<sup>6</sup> *Hume v. Commercial Bank*, 1 Lea, 220, 228.

<sup>7</sup> *Union Sugar Refinery v. Mathieson*, 8 Cliff. 146.

<sup>8</sup> *Gregg v. Brower*, 67 Ill. 525; *Richardson v. Linney*, 7 B. Mon. 575.

<sup>9</sup> *Hart v. Bloomfield*, 66 Miss. 100; s. c., 5 So. Rep. 620. Where the defendant appears, answers and goes to trial without objection at a term before the return term of the summons, he waives the right to postpone the hearing until the return

<sup>10</sup> Code of Virginia, § 8375.



final decree a defendant may be allowed to file his answer,<sup>1</sup> but the hearing is not to be delayed in consequence thereof unless for good cause shown, etc. It was held that failure to join necessary parties, and not the filing of answers, was the cause of delay, where the answers in a suit to set aside a conveyance disclosed that a portion of the lands sought to be recovered were conveyed before suit brought to *bona fide* purchasers without notice.<sup>2</sup>

§ 629. Application for continuance.—It is discretionary with the chancellor to refuse an application for a continuance, and his ruling is not reviewable on appeal.<sup>3</sup> A continuance of a cause ready for hearing on the original bill, upon the filing of a cross-bill, is not a matter of right.<sup>4</sup> Although the federal courts follow the construction of the statutes and constitution adopted by the courts of a State wherein they sit, yet when a suit in equity in a federal court involving such a construction has been set for hearing, the court will not on motion of a party postpone the trial to await the decision of the Supreme Court of the State in a suit pending before it and alleged to involve the same question where it is not clear that the precise point will be determined in the latter suit, and it is uncertain when it will come on for adjudication.<sup>5</sup>

term, and cannot afterwards raise the objection that the court had no jurisdiction. *Anderson v. Moore* (Ill.), 38 N. E. Rep. 648. See, also, *Keats v. Rector*, 1 Ark. 391. Certainly a co-defendant defaulted for want of an answer cannot complain in such a case. *Clark v. Carnall*, 18 Ark. 309.

<sup>1</sup> The word "may" is imperative and means "must." *Bean v. Simmons*, 9 Gratt. 389.

<sup>2</sup> *Welsh v. Solenberger*, 85 Va. 441; s. c., 8 S. E. Rep. 91.

<sup>3</sup> *Thornton v. City Council of Montgomery* (Ala.), 10 So. Rep. 634; *Trammel v. Vane*, 62 Ala. 301; *Camden v. Bloch*, 65 Ala. 286; *Ex parte Jones*, 66 Ala. 202; *Culver v. Colehour*, 115 Ill. 558; *Reece v. Darby*, 5 Ill. 159; *Hahn v. Huber*, 83 Ill. 243. Certainly not reviewable where no abuse

of discretion is shown. *Joplin v. Cordrey* (Ky.), 5 S. W. Rep. 397. In that case on a partnership accounting, where the master reported that one of the partners had paid out for the firm more than he had collected of its assets, and that it did not appear from what source he had obtained the money, the refusal of a continuance asked for upon an affidavit stating that, if time were given, it would be made to appear whence such partner obtained the money, but not disclosing how, or that there was any additional testimony, was held not to be error.

<sup>4</sup> *Phillips v. Edsall*, 127 Ill. 535; s. c., 20 N. E. Rep. 601.

<sup>5</sup> "It is the duty of the federal courts as of other courts to give as speedy justice as may be to suitors;

But if the same question be at issue in another suit pending in the United States Supreme Court, a circuit court will continue the cause in the absence of special reasons to the contrary.<sup>1</sup>

**§ 630. Condition of the case as to defendants.**—When the relative situation of the defendants is such that the complainant might or might not, at his election, have made them parties, the case may be heard as to some of the defendants before it is prepared as to the other defendants. But where the interests of the defendants are so intimately connected that either could object to a bill because the others were not made parties, a decree as to some of them without having the cause heard as to all would be erroneous.<sup>2</sup>

**§ 631. How a cause is heard.**—"The cause having been called on the docket and both parties having announced their readiness for trial, or the motion for a continuance having been overruled, the chancellor directs that the case be taken up.<sup>3</sup> The complainant's solicitor thereupon makes a brief

and while it is also their plain duty to accept State law from the State Supreme Courts on the construction of State laws and constitutions, it never has been held proper for them to delay litigation before them until State courts shall have decided the same questions, for this would be an abdication of their duties as courts. When a question of law is presented, of whatever character, they must follow the lights they have." *City of Detroit v. Detroit City Ry. Co.*, 55 Fed. Rep. 569, 571, citing *Burgess v. Seligman*, 107 U. S. 20.

<sup>1</sup> *Friedman v. Harrington*, 56 Fed. Rep. 860. See, also, *Northern Pac. R. Co. v. Glaspell*, 49 Fed. Rep. 482.

<sup>2</sup> *Cox's Heirs v. Strobe*, 11 Bibb, 273; *Beachamp v. Davis*, 8 Bibb, 113; *Walton v. Fretwell*, 8 Marsh. 520; *Evans v. Holmes*, 4 J. J. Marsh. 5; *Castleman v. Holmes*, 4 J. J. Marsh. 5; *Lee v. Wickliffe*, 1 Monr. 110; *McClain v. French*, 2 Monr. 148, the rubric of which case is as follows:—

"A suit in chancery never can be heard and disposed of as to some of the parties unless it be in a situation to be heard and disposed of as to all who are necessary parties." Citing *Mosley v. Lewis*, 4 Bibb, 160. But a defendant who goes to a hearing and appeals from a decree waives the objection that as to some of the defendants the cause was not at issue. *Davenport v. Auditor-General*, 70 Mich. 192, distinguishing *Graham v. Elmore*, Harr. Ch. 265; *Schwab v. Mobley*, 47 Mich. 512.

<sup>3</sup> A cause may be heard in private, even against the consent of the parties. *In re Lord Portsmouth*, G. Coop. 106; *Ogle v. Brandling*, 2 R. & M. 688; *Barb. Ch. Pr.* 319. See *Andrew v. Raeburn*, L. R. 9 Ch. App. 522; *Nagle-Gilman v. Christopher*, 4 Ch. Div. 173. But not in Tennessee, it is said, without consent of parties. *Gibson's Suits in Chancery*, § 524, n. 5.

statement of the nature of his bill. The defendant's solicitor then states his defense or reads the material part of his answer. If there be any defendants in default as to whom no judgment *pro confesso* has been entered, the complainant may now have a *pro confesso* entered against them. The evidence is then read in the following order:—1st, the evidence in support of the bill is read by the complainant's solicitor; 2d, the evidence of the defendant is read by his solicitor; and 3d, if the complainant has any rebutting evidence it is read last."<sup>1</sup>

§ 632. Right to open and close.—The party who holds the affirmative of an issue and upon whom consequently the *onus probandi* devolves has the right to open and close the argument.<sup>2</sup> Upon hearing on bill, cross-bill, answers and depositions, where both causes come on to be heard together and both parties have material allegations to sustain under their respective bills, the complainant in the original bill is entitled to the opening and reply.<sup>3</sup>

§ 633. Hearing without pleadings.—The court will not take cognizance of and hear a case in which the parties agree upon a statement of facts and stipulate that the court shall take jurisdiction, try the case and render a decree without pleadings; nor will a State statute authorizing such a proceeding affect the practice in the federal courts sitting in that State.<sup>4</sup> Where the parties by agreement proceed to a hearing on the bill, exhibits and proofs without an answer, the decree, if warranted by the evidence, will be sustained. Such a practice is loose and irregular, but the waiver is within the limits of the power of the parties to the suit.<sup>5</sup>

<sup>1</sup> Gibson's Suits in Chancery, § 524.

<sup>2</sup> Higdon v. Higdon, 6 J. J. Marsh. 48.

<sup>3</sup> Murphy v. Stulta, 1 N. J. Eq. 560. "The right to open and close the argument belongs to the party who pleads affirmative matter in abatement; or who moves to dismiss; or who demurs; or who pleads affirmative matter in bar; or who excepts to an answer, deposition or master's report; or who objects to a witness

or to his evidence; or who maintains the affirmative of any given question; or who has the entire burden of proof to bear." Gibson's Suits in Chancery, § 524, n. 7.

<sup>4</sup> Nickerson v. Atchison & Co. R. Co., 30 Fed. Rep. 85.

<sup>5</sup> Wilson v. Spring, 64 Ill. 14, 17. Where the whole ground of a suit has been removed by the death of the complainant, the court will not hear an argument merely to deter-

§ 634. **Hearing on bill and unsworn answer.**—When a cause is submitted for hearing on bill and unsworn answer, the complainant is not entitled to relief unless so entitled on the allegations of the bill admitted by the answer.<sup>1</sup> Hence, where a bill for an injunction is heard in that manner, consideration will be solely directed to the inquiry whether the complainant has the right to have the injunction made permanent.<sup>2</sup> Where a rule of court required the register to note upon the minutes the testimony offered at the hearing, and provided that no other testimony should be considered as part of the record, it was held that after a regular submission, accompanied by a proper memorandum of the register, was vacated, the note of testimony thereby became inoperative, and a subsequent submission without a memorandum by the register was deemed to constitute a hearing on bill and answer alone, although the decree recited that the cause was submitted on pleadings and testimony.<sup>3</sup>

§ 635. **Status of interlocutory orders.**—By the modern practice on a final hearing all previous decretal orders are before the court and may be modified, altered or vacated as justice may require.<sup>4</sup> Thus where the court made an interlocutory order stating that the complainants were entitled to recover certain claims and directing an account to be taken by the master, it was held that upon final hearing at the argument of exceptions to the master's report its previous order was fully open for revision and correction.<sup>5</sup>

mine the question of costs. *Johnson v. Thomas*, 2 Paige, 377. The same rule applies where the parties settle the cause between themselves, reserving the question of costs. *Stewart v. Ellice*, 2 Paige, 604; *Eastburn v. Kirk*, 2 Johns. Ch. 317.

<sup>1</sup> *Reese v. Barker*, 85 Ala. 474; s. c., 5 So. Rep. 305; *Winter v. City Council*, 83 Ala. 589.

<sup>2</sup> *Winter v. City Council*, 83 Ala. 589.

<sup>3</sup> *Reese v. Barker*, 85 Ala. 474.

<sup>4</sup> *Gibson v. Rees*, 50 Ill. 383, 410; *Consequa v. Fanning*, 3 Johns. Ch. 364; *Mosher v. Joyce*, 2 C. C. App. 322, 325.

An erroneous interlocutory order should be disregarded in making up final judgment. *N. & C. Bridge Co. v. Douglass*, 12 Bush, 676.

<sup>5</sup> *Fourniquet v. Perkins*, 16 How. 82. Cf. *Hunter v. Carmichael*, 12 Sm. & M. 726, where an order setting aside an interlocutory decree without motion, petition or other cause assigned or appearing upon the record was reversed, the appellate court holding that some sufficient ground must be shown. Where a cause has been deliberately heard upon pleadings and proofs and a decision reached, and a party has a right of appeal, in order

**§ 636. Rules influencing the decision — Law of the case.** A decision on demurrer is the law of the case until a different rule is laid down by the appellate court, although such decision was rendered by another judge than the one who finally tries the case.<sup>1</sup> "Unfortunately, owing to our very absurd judicial system, it seems quite impossible to introduce into it the rule of *stare decisis* as between the different circuits and in the courts inferior to the Supreme Court, the decisions of that tribunal alone being binding as authority upon all."<sup>2</sup> But one judge will not determine against the conclusions of his associate upon substantially the same representations of fact without leave first granted for a re-argument of the question.<sup>3</sup>

**§ 637. Hearing on bills of interpleader.**— Where the defendants in a bill of interpleader admit the facts stated in the bill and on which the right to file a bill of interpleader rests, and set up no new facts as against the complainant or in bar

to authorize the court to reverse the former decision it must be perfectly clear that an error was committed. *Coupe v. Weatherland*, 87 Fed. Rep. 16.

<sup>1</sup> *Wakelee v. Davis*, 44 Fed. Rep. 582.

<sup>2</sup> Per Hammond, J., in *United States v. Huggell*, 40 Fed. Rep. 636, 644, holding that the relative rank of the judges sitting in the circuit courts does not add to the authority of their decisions. But see *Preston v. Walsh*, 10 Fed. Rep. 815.

<sup>3</sup> *Cole Silver Min. Co. v. Virginia &c. Water Co.*, 1 Sawy. 685. See, also, *Worswick Mfg. Co. v. City of Philadelphia*, 30 Fed. Rep. 625. "Plaintiff urges that when one circuit court of the United States decrees a point all the others should conform their views to this decision until the matter is settled by the rulings of the Supreme Court. But this is not the rule which prevails in the circuit courts of the United States. The very decision that counsel for the plaintiff would have me consider as binding, *Denny v. Dodson*, 82 Fed. Rep. 899, is an

illustration showing that the rule contended for does not prevail. The very distinguished judge who delivered that opinion refused to be governed by a former decision of the same court rendered by the experienced and able Judge Deady upon a material point in regard to the nature of plaintiff's title to the land granted it. A United States circuit court undoubtedly always, with reluctance, will assert its right to disagree with the decision of another circuit court even when satisfied that it is erroneous." Knowles, J., in *Northern Pac. R. Co. v. Sanders*, 47 Fed. Rep. 604. As to the practice of the federal courts in following State statutes and decisions, see *City of Detroit v. Detroit City Ry. Co.*, 55 Fed. Rep. 569, 571; §§ 6, 7, 8, *supra*; articles on "Conflict between federal and State decisions" in 14 *Am. Law Rev.* 211, by Hon. Wm. B. Hornblower, and 16 *Am. Law Rev.* 743, by J. B. Heiskell, Esq., of the Memphis Bar. See, also, Index, tit. FEDERAL COURTS.

of his suit, it seems to be sufficient for him to file a replication, and set the cause down for a decree to interplead, without waiting until the proofs are taken as between the defendants.<sup>1</sup> But if the defendants or either of them deny the allegations in a bill of interpleader, or set up distinct facts in bar of the suit, the complainant must reply to the answer and close the proofs in the usual manner before he can bring his cause to a hearing.<sup>2</sup> The regular course of proceeding on a bill of interpleader is to take a decree that the defendants interplead, which withdraws the complainant in the original bill from further participation in the suit, and the case then becomes a case between the defendants as between a complainant and defendant.<sup>3</sup>

**§ 638. Proceedings on bills of interpleader.**—On bills of interpleader the court, in disposing of the questions in dispute among the defendants, is at liberty to adopt any recognized method of trial which will accomplish justice in the particular case. If at the hearing on the bill the questions in which the defendants are alone interested are stated with sufficient clearness and certainty in the answers to the bill to present proper issues, and they are ripe for decision, the court may at the same time that it decides the question whether the bill was properly filed, also decide the questions at issue among the defendants, and dispose of the case finally.<sup>4</sup> But if the case among the defendants is not in proper condition, the court directs an action, or an issue, or a reference to a master,

<sup>1</sup> *City Bank v. Bangs*, 2 Paige, 570.

<sup>2</sup> *City Bank v. Bangs*, 2 Paige, 570.

<sup>3</sup> *Willson v. Salmon*, 45 N. J. Eq. 257; *Rowe v. Hoagland*, 7 N. J. Eq. 181; *Catherall v. Davies*, 1 Giff. 326; *Atkinson v. Manks*, 1 Cowen, 691; *St. Louis Life Ins. Co. v. Alliance &c. L. Ins. Co.*, 23 Minn. 7; 2 *Daniell's Ch. Pr.* (2d ed.) 1568. As to the scope of the suit between the defendants after the plaintiff has retired, see *Horton v. Baptist Church*, 34 Vt. 817. The death of the plaintiff at that stage does not abate the suit. *Anon.*, 1 Vern. 351. A complainant filed his bill with a double aspect, asking that a certain voluntary partition should

be established, or, failing in that, to have partition made. Such voluntary partition was established by decree, but on appeal that decree was reversed and the record remitted to be proceeded in according to the practice, etc. It was held to be right for the chancellor to retain the bill in order to decide on the alternative prayer for a partition. *Polhemus v. Emson*, 29 N. J. Eq. 588.

<sup>4</sup> *Kirtland v. Moore*, 40 N. J. Eq. 100, 108; *Hall v. Baldwin*, 45 N. J. Eq. 858, 865; *Condict v. King*, 18 N. J. Eq. 375; *Hendrickson v. Decon*, 1 N. J. Eq. 593; *Rowe v. Hoagland*, 7 N. J. Eq. 139. The complainant is

as may be best suited to the nature of the case.<sup>1</sup> It was recently decided in the Supreme Court of New York that an order of interpleader upon a defendant's motion, directing him to pay into court the whole fund due from him, where no claim was made against the right of one of the plaintiffs to half of the fund, was erroneous, as the amount should be directed to be paid to the latter at once.<sup>2</sup> If one defendant in a bill of interpleader establishes a title and the other makes a default, the court will decree payment to the former and a perpetual injunction against the latter.<sup>3</sup>

§ 639. **Objections at the hearing.**—"When the cause is heard without objection by either party, all steps not taken by either which the other had a right to insist upon for the orderly bringing the cause to a hearing must be considered as waived."<sup>4</sup> Mere formal defects in the bill cannot be objected to at the hearing.<sup>5</sup> Objections for defect of parties are not usually available when urged for the first time at the hearing,

dismissed with his costs up to that time. *City Bank v. Bangs*, 2 Paige, 578. See § 1014, *infra*; and for the requisites of a bill of interpleader, § 141 *et seq.*, *supra*.

<sup>1</sup> *Condict v. King*, 18 N. J. Eq. 375; *Kirtland v. Moore*, 40 N. J. Eq. 106. 108; *Hall v. Baldwin*, 45 N. J. Eq. 858, 865; *Angell v. Hadden*, 16 Ves. 208; *City Bank v. Bangs*, 2 Paige, 570. On a reference to a master to settle the rights of defendants in a bill of interpleader as between themselves, the court will give them the benefit of a discovery as against each other if they or either of them desire it. *City Bank v. Bangs*, 2 Paige, 570, holding, also, that where one of the defendants in a bill of interpleader by his answer makes a claim against the complainant beyond the amount admitted to be due and paid into court, and which is not claimed by the other defendants, he will be permitted to proceed at law to establish his right to that part of his demand which is not in controversy with the other defendants.

<sup>2</sup> *Feldman v. Grand Lodge*, 19 N. Y. Supl. 73.

<sup>3</sup> *Richards v. Salter*, 6 Johns. Ch. 445.

<sup>4</sup> *Wheeler, J.*, in *Allen v. Mayor*, 18 Blatchf. 239, 240.

<sup>5</sup> *McElwain v. Willis*, 3 Paige, 505; *Freeman v. Scofield*, 16 N. J. Eq. 28. When the statute points out a remedy and a mode of proceeding to attain it, an objection may be taken, in any stage of the cause, that the statutory provisions have not been complied with. *Manning v. Merrit*, Clarke's Ch. 98. Technical objections to testimony come too late at the hearing. *De Courcey v. Collins*, 21 N. J. Eq. 357; *McClaskey v. Barr*, 48 Fed. Rep. 180. An infant defendant, without regard to his answer, may make at the hearing any objection to the relief which the case discloses, whether it was apparent on the bill itself, or comes out in the testimony. *Jones v. Weed*, 4 Sandf. Ch. 208. An intervening creditor in a suit to foreclose a mortgage, who has filed an answer admitting the

unless in cases where an indispensable party is wanting.<sup>1</sup> Objections for misjoinder of parties,<sup>2</sup> or for multifariousness,<sup>3</sup> will not be noticed, as a general rule, unless they are taken in the pleadings.<sup>4</sup>

**§ 640. The same subject continued — Adequate remedy at law.**— The objection of adequate remedy at law comes too late at the hearing on the merits where the court has jurisdiction of the parties and the subject-matter.<sup>5</sup> But where the case is one in which it is not competent for the court to grant the only relief asked, the remedy being at law, or it appears that chancery has not under any circumstances jurisdiction of the subject of the bill, the court will entertain the objection

execution of the mortgage, cannot set up at the hearing that the mortgage was executed by directors of a corporation without authority. *Pugh v. Fairmount & Co. Mining Co.*, 119 U. S. 238.

<sup>1</sup> § 78, *supra*. "If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties." United States Equity Rule 53. "Where the defendant shall by his answer suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following (that is to say):— 'Set down upon the defendant's objection for want of parties.' And when the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an ob-

jection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court if it thinks fit shall be at liberty to dismiss the bill." United States Equity Rule 52. Where the grantor in a trust deed filed a bill against the trustee to have the deed set aside on the ground that it was delivered by another without authority, the *cestui que trust* was held to be a necessary party, and, on final hearing, the cause was ordered to stand over until he should be made a party. *Armstrong v. Armstrong*, 19 N. J. Eq. 357.

<sup>2</sup> §§ 79, 80, *supra*.

<sup>3</sup> §§ 126, 128, *supra*.

<sup>4</sup> If the plaintiff in a suit for specific performance of an agreement to exchange lands cannot give the title mentioned in the agreement, the bill may be dismissed although the objection is not stated in the answer or taken until the hearing before a master to whom the case has been referred to receive the proper conveyance. *Park v. Johnson*, 7 Allen, 378.

<sup>5</sup> § 13, *supra*.



at any stage of the case, or, *sua sponte*, dismiss the bill.<sup>1</sup> And where a party has had an opportunity to insist upon his rights in a court of law in a suit directly involving them and refrains from doing so, "he is barred by his own laches" from litigating those questions on the chancery side of the court.<sup>2</sup>

§ 641. Dismissal upon the answer.—Where the answer completely denies all the equities of the bill, and the complainant has not met those denials with any proof or made issue thereon by replication, the bill must be dismissed for want of equity;<sup>3</sup> and so where the equities of a bill are denied by the responsive allegations of the answer, to which there is a general replication, and the case is heard upon the bill, exhibits, answer and replication.<sup>4</sup> But where the answer admits enough to sustain a decree for the complainant his bill should not be dismissed.<sup>5</sup>

§ 642. Dismissal of bills alleging joint cause of action.—Where a suit is brought jointly the bill will be dismissed if either of the complainants fails to make out a case for relief.<sup>6</sup> So where a complainant's cause of action is against the defendants jointly, the bill will be dismissed if a joint cause of action be not made out.<sup>7</sup>

<sup>1</sup> § 14, *supra*.

<sup>2</sup> *Packwood v Gridley*, 39 Ill. 388, an objection at the hearing. See, also, *Elston v. Blanchard*, 2 Scam. (Ill.) 420; *Abrams v. Camp*, 3 Scam. (Ill.) 290; *Scott v. Whitlow*, 20 Ill. 310; *Ballance v. Loomis*, 22 Ill. 84. The plaintiff's laches may be taken advantage of by a defendant who has not pleaded it. 1 *Foster's Federal Practice* (2d ed.), § 299; *Baker v. Riddle*, Baldwin, 394.

<sup>3</sup> *Parker v. Town of Concord*, 39 Fed. Rep. 718. If a suit in equity is heard on the bill and answer the allegations of the answer must be taken as true where they conflict with those of the bill. *American Carpet Lining Co. v. Chipman*, 146 Mass. 385.

<sup>4</sup> *Patton v. J. M. Brunswick & Balke Co.*, (Fla.), 2 So. Rep. 366.

<sup>5</sup> *Lampley v. Weed*, 27 Ala. 621.

The weight of an answer as evidence is discussed in chapter XI, *supra*, on ANSWERS.

<sup>6</sup> *Jones v. Quinnipiac Bank*, 29 Conn. 28, where acceptances to secure which a mortgage was given were negotiated separately to parties who united in a bill to obtain the benefit of the security.

<sup>7</sup> *McElroy v. Ludlum*, 32 N. J. Eq. 828, 832. Where a joint liability is asserted the decree must be against all the parties before the court who do not establish some personal discharge, and the dismissal as to some of the parties without reason will be ground for reversing the decree. *Mandeville v. Riggs*, 2 Pet. 482.

§ 643. Dismissal without prejudice.— Where a bill is dismissed at the hearing upon a mere defect of form in the pleadings, and not upon the merits of the case, it should be dismissed without prejudice to the complainant's right to institute a new suit.<sup>1</sup> Thus a bill dismissed for repugnancy is properly dismissed without prejudice.<sup>2</sup> So, a decree dismissing a bill for want of parties,<sup>3</sup> or for misjoinder of parties,<sup>4</sup> or for multifariousness,<sup>5</sup> or for want of jurisdiction,<sup>6</sup> should be without prejudice or should state the ground of dismissal; and an absolute dismissal will be reversed on appeal, with instructions to dismiss without prejudice or to permit proper amendments, as the case may be.<sup>7</sup>

<sup>1</sup> *Crosier v. Acer*, 7 Paige, 186; *Wilber v. Collier*, 8 Barb. Ch. 427; *Shaw v. Coster*, 8 Paige, 339. The general practice in this country and in England when a bill in equity is dismissed, where there is an intention further to litigate the matters involved, is to use words of qualification, such as "without prejudice" or some equivalent term. *Howth v. Owens*, 30 Fed. Rep. 910. Where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court should dismiss the bill without prejudice to an action at law. *Mitchell v. Dowell*, 105 U. S. 480, and cases there cited; *Codington v. Mott*, 14 N. J. Eq. 431; *Rosse v. Rust*, 4 Johns. Ch. 300; *M'Neill v. Cahill*, 2 Bligh, 228. A bill will not be dismissed "without prejudice" where there is not much probability that the complainant could derive any benefit from further litigation. *Anthony v. Peay*, 18 Ark. 24.

<sup>2</sup> *Williams v. Jones*, 79 Ala. 119; *Tatum v. Walker*, 77 Ala. 563; *Ledsinger v. Central Line*, 79 Ga. 716; s. c., 5 S. E. Rep. 197.

<sup>3</sup> *Kendig v. Dean*, 97 U. S. 423; *Van*

*Epps v. Van Deusen*, 4 Paige, 64; *Detweiler v. Holderbaum*, 42 Fed. Rep. 337, 341; *McCauley v. Six*, 34 Ark. 379; *Eddins v. Buck*, 28 Ark. 507. Such a dismissal does not render the subject of the controversy *res adjudicata*. *St. Rome v. Levee Cotton Press Co.*, 127 U. S. 614.

<sup>4</sup> *House v. Mullen*, 23 Wall. 42.

<sup>5</sup> *Williams v. Jackson*, 107 U. S. 478, 484.

<sup>6</sup> *Richards v. Allis* (Wis.), 53 N. W. Rep. 593; *Gaylords v. Kelshaw*, 1 Wall. 81; *Hartell v. Tilgham*, 99 U. S. 547; *Clarke v. Sawyer*, 2 Barb. Ch. 411. In *Lacassaque v. Chapins*, 144 U. S. 119, a decree dismissing a bill absolutely upon demurrer for want of equity was, under the circumstances, modified so as to declare it without prejudice to an action at law, citing *Harsburg v. Baker*, 1 Pet. 232; *Barney v. Baltimore City*, 6 Wall. 280; *Kendig v. Dean*, 97 U. S. 423; *Rogers v. Durant*, 106 U. S. 644; *Scott v. Neely*, 140 U. S. 106, 117.

<sup>7</sup> *Kendig v. Dean*, 97 U. S. 423; *House v. Mullen*, 23 Wall. 42; *Rogers v. Durant*, 106 U. S. 644. See, also, *Union Pac. Ry. Co. v. Harmon* (C. C. A.), 54 Fed. Rep. 29; *Boyd v. Jones*, 44 Ark. 814.

§ 644. Effect of dismissal without prejudice.—If a suit is dismissed for defect of pleadings or parties or a misconception of the form of proceedings, or the want of jurisdiction, or is disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.<sup>1</sup> And where the qualifying words “without prejudice” are used, although the relief sought in a new bill of complaint and the matter therein is precisely the same as in the original bill, the parties will be permitted to litigate their claims as if no previous suit had been instituted.<sup>2</sup>

§ 645. Effect of absolute dismissal.—A dismissal of a bill in equity after hearing, when it is not expressed to be without prejudice, is a bar to another suit for the same cause,<sup>3</sup> by the same plaintiff or his representatives, against the same defendant or his representatives.<sup>4</sup> But it has been held that a subse-

<sup>1</sup>Hughes v. United States, 4 Wall. 282; Walden v. Bodley, 14 Pet. 156, 161. A voluntary dismissal by a complainant is not a bar to another suit. Kempton v. Burgess, 186 Mass. 192. See § 450 *et seq.*, *supra*. A dismissal of a bill on the ground of multifariousness will not prevent the complainant from filing new bills against the defendants separately for the relief to which he may be entitled against them respectively. Jackson v. Forrest, 2 Barb. Ch. 576, 582.

<sup>2</sup>Northern Pac. R. Co. v. St. Paul &c. Ry. Co., 47 Fed. Rep. 586, 587; 2 Daniell's Ch. Pr. (5th ed.) 994.

<sup>3</sup>Durant v. Essex Co., 8 Allen, 108; Holmes v. Remsen, 7 Johns. Ch. 286; Perine v. Dunn, 4 Johns. Ch. 140, a dismissal of a bill to redeem; Case v. Beauregard, 101 U. S. 688; Bigelow v. Winsor, 1 Gray, 299; Mickles v. Thayer, 14 Allen, 121; Pugh v. Holt, 27 Miss. 461; Curtis v. Bardstown, 6 J. J. Marsh. 536; Knight v. Atkisson, 2 Tenn. Ch. 384; Sayles v. Tibbitts, 5 R. I. 79; Low v. Mussey, 41 Vt. 398. The dismissal of a suit does not prevent consequential proceedings, a va-

riety of which may be necessary, such as for leave to sue a bond, for re-taxation of costs, and the like. For such purposes a suit will be deemed before the court. Mutual Safety Ins. Co. v. Roberts, 4 Sandf. Ch. 592.

<sup>4</sup>Neafie v. Neafie, 7 Johns. Ch. 1; Borrowscale v. Tuttle, 5 Allen, 377; Foote v. Gibbs, 1 Gray, 413. Where a suit brought to enforce a parol trust was submitted on the pleadings and proofs, and a decree was entered dismissing the bill “without prejudice to any parties to enforce” a trust created by a certain deed to one of the defendants, and without prejudice to any of the rights created by a certain will, it was held that this was a final determination of the merits of the controversy and settled the question of the existence of the parol trust against the complainants, and that the decree could be pleaded in bar in a subsequent suit by the same complainant to enforce the same trust. Oyster v. Oyster, 28 Fed. Rep. 909. A decree made in the following terms: — “This cause coming on for hearing, and being submitted to the

quent bill by the original defendant against the original complainant opens the cause upon the merits.<sup>1</sup>

§ 646. Dismissal for want of prosecution.— The United States equity rules provide that “if the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course unless a judge of the court shall allow him further time for that purpose.”<sup>2</sup> And if a plaintiff neglects to file a replication within the prescribed period the defendant is entitled as of course to a dismissal of the suit; but the court may, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.<sup>3</sup> One defendant may

court upon bill, answer and replication, and having been duly considered, the court finds, adjudges and decrees that the equities are with the defendant, that the bill of complaint be dismissed, and that defendant recover its costs, to be taxed,” is an absolute dismissal on the merits. *Lyon v. Perin & Co.*, 125 U. S. 698. Where there was an express allegation in the bill that another bill for the same cause of action was dismissed absolutely for the reason that a plea which had been filed and not denied presented a good defense, the presumption is that it was on the merits, and in the absence of explanatory averments to overcome it the pending bill was dismissed. *Leary v. Long*, 108 U. S. 397. A decree dismissing an amended bill means the dismissal of the bill as amended, and is a final disposition of the whole case. *Bradish v. Grant*, 119 Ill. 606.

<sup>1</sup> *Neafie v. Neafie*, 7 Johns. Ch. 1.

<sup>2</sup> Equity Rule 38. See *Chicago & C. R. Co. v. Rolling Mill Co.*, 109 U. S. 702.

<sup>3</sup> Equity Rule 66. See *Poultney v.*

*City of Lafayette*, 8 How. 81. After a cause has been set down for hearing on bill and answer, it is too late for a motion to dismiss because a replication has not been filed within the time limited by the rule. *Reynolds v. Crawfordsville Bank*, 112 U. S. 405. See, also, Rule 69 and amendment of 1869 to Rule 67 relating to taking of testimony. Under Equity Rule 69, giving a complainant three months after issue joined in which to take depositions, the court refused to dismiss a cause for want of prosecution for nine months' delay, where it appeared from the affidavits of complainant's counsel that from a conversation with defendant's counsel they were led to believe that a compromise was mutually desired and would be effected, and that they in good faith submitted the matter to their clients, who lived in Ireland, and, not having been yet advised of their intentions as to the proposition, took no proof, understanding the defendant to agree that none need be taken pending negotiations, though from the statement of

move to dismiss where the complainant has not brought before the court a necessary party named as defendant in the bill.<sup>1</sup> If a bill be lost or abstracted from the files another may be substituted; but if this is not done the suit must be dismissed.<sup>2</sup>

**§ 647. Retaining a cause for further relief.**— A court of equity having once acquired jurisdiction of a cause may retain it generally for relief.<sup>3</sup> Thus a bill may be retained against a trustee praying for an account, etc., in order to effect an accounting between the parties, including matters subsequent to the filing of the bill, although the plaintiff has failed to establish the allegations in his bill.<sup>4</sup> Although a patent expired fifteen days after a bill for an injunction and recovery of profits was filed, it was held competent for the

the conversation in the affidavits of defendant and his counsel such impression and delay were not warranted thereby. *Beirne v. Wadsworth*, 86 Fed. Rep. 614, where the defendant was given leave to renew the motion at the next term if no settlement was reached or the case prepared. "When the cause is heard without objection by either party, all steps not taken by either which the other had a right to insist upon for the orderly bringing the cause to a hearing must be considered as waived." Per Wheeler, D. J., in *Allen v. Mayor &c.*, 7 Fed. Rep. 483.

<sup>1</sup> *Jessup v. Ill. Cent. R. Co.*, 86 Fed. Rep. 785, 786. See *Greenleaf v. Queen*, 1 Peters, 188. By the rule of January 14, 1871, in the United States circuit court for the southern district of New York, either party noticing issues or appeals for trial or hearing "may when the cause shall be called move the trial or hearing, and take verdict or judgment, or order to dismiss the suit for not going to trial, as the court shall direct." See further on dismissals for want of prosecution, §§ 465, 466, *supra*. A

bill cannot be dismissed for want of prosecution while a demurrer is pending. The defendant's course is to set down the demurrer for argument. *McVickar v. Filer*, 24 Mich. 241.

<sup>2</sup> *Glover v. Rainey*, 3 Ala. 727.

<sup>3</sup> *Swift v. Dewey*, 20 Neb. 107; *Miller v. McCan*, 7 Paige, 451; *Buchanan v. Griggs*, 20 Neb. 165. And for all purposes germane to the subject-matter of the bill, although some of these matters have ceased to be matters of contention. *Hurd v. Asherman*, 117 Ill. 501. The court of chancery in New Jersey has never adopted the principle that, because its jurisdiction has once rightfully attached, it will retain the cause as a matter of right for the purpose of complete relief. The court will not retain the cause unless the subject-matter is one which appropriately belongs to equity jurisdiction. *Little v. Cooper*, 10 N. J. Eq. 274.

<sup>4</sup> *Hagar v. Whitmore*, 82 Me. 248; *a. c.*, 19 Atl. Rep. 444. See, also, *Frelinghuysen v. Nugent*, 86 Fed. Rep. 239.

court, in the exercise of its discretion, to retain the bill and grant the incidental relief that belongs to cases of that sort.<sup>1</sup> But where, in a suit originally brought upon a subject-matter requiring equitable relief, the dispute is so adjusted by agreement between the parties that nothing remains to be litigated but mutual money demands, the case being then one proper to be submitted to a jury, the complaint should be dismissed without prejudice, and the parties remanded to their remedies in a court of law.<sup>2</sup>

**§ 648. Retaining a cause to await action at law.**—It is a general rule that if title to lands is disputed the right must be established at law and the bill retained until it is settled.\* Thus upon a bill for partition, if the legal title to the lands is put at issue, the court will not proceed to settle such title, but will either dismiss the bill or retain it to allow the title to be determined in an action at law.<sup>4</sup> But where the defendant

<sup>1</sup> "This has often been done in patent causes, and a large number of cases may be cited to that effect, and there is nothing in the decision in *Root v. Railroad Co.*, 105 U. S. 189, to the contrary." *Clark v. Wooster*, 119 U. S. 822, and cases there cited. Where an injunction bill was brought omitting certain indispensable parties, it was said that the court might properly retain the bill until the plaintiffs had had an opportunity of litigating and establishing their title against those parties in a competent tribunal, and if the plaintiffs there prevailed, proceed to a final decree. *Mallow v. Hinde*, 12 Wheat. 194.

<sup>2</sup> *Helmick v. Davidson*, 18 Oreg. 456; s. c., 23 Pac. Rep. 244. A bill for specific performance will not be retained for the sake of awarding damages if the plaintiff fails to make out a case for equitable relief. *Lochman v. Meehan*, 21 N. Y. Supl. 389. See, also, *McKinnon v. McKinnon*, 46 Fed. Rep. 718; *Sanford v. McLean*, 8 Paige, 117; *Dodd v. Home Mut.*

*Ina Co.*, 22 Oregon. 8; s. c., 28 Pac. Rep. 881. So on a bill for injunction and damages. *W. J. Johnston Co. v. Hunt*, 21 N. Y. Supl. 814.

<sup>3</sup> *Vreeland v. Vreeland*, 49 N. J. Eq. 822, and cases there cited.

<sup>4</sup> *Stockbower v. Kanouse* (N. J. Err. & App.), 26 Atl. Rep. 838; *Coxe v. Smith*, 4 Johns. Ch. 271; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Manners v. Manners*, 2 N. J. Eq. 834; *Brown v. Cranberry Iron & Coal Co.*, 40 Fed. Rep. 849, where proceedings were stayed for a year to await the event of an action of ejectment; *Dewitt v. Ackerman*, 17 N. J. Eq. 215; *Riverside Cemetery Co. v. Turner*, 24 N. J. Eq. 18; *Obert v. Obert*, 10 N. J. Eq. 98; *Lucas v. King*, 10 N. J. Eq. 277. "When the object of a bill is to secure affirmative equitable relief, and one of the grounds upon which the right to such relief rests is a legal title, as in suits for partition, for assignment of dower, for an account upon the infringement of a patent, then, if the legal title is disputed, the usual course is to retain the bill until

sets up an equitable title to the whole estate in the premises or impeaches the complainant's title on equitable grounds, the court will not suspend the suit until the title be settled, but will pass upon such title and settle all disputes concerning it in the partition suit and grant relief accordingly.<sup>1</sup>

the title is settled at law." Outcalt v. George W. Helme Co., 43 N. J. Eq. 665, 676, declaring, on the other hand, that if the judgment at law would seem to afford adequate relief, the bill should not be retained pending the legal litigation. The proper course for the court, where the lands of which partition is sought are held adversely to the complainant, is to dismiss the bill as prematurely filed, but without prejudice to the complainant's right to institute a new suit after he shall have obtained possession by a recovery in ejectment or otherwise. Burhaus v.

Burhaus, 2 Barb. Ch. 398. A bill for an account of rents and profits will not be stayed until the title is established at law upon a mere suggestion in the plea of an exclusive title in the defendant. He must set forth his title affirmatively. Livingston v. Livingston, 3 Johns. Ch. 51. So in a bill for partition the title is not put in dispute by mere inference from pleadings or proofs. Hay v. Estell, 18 N. J. Eq. 251.

<sup>1</sup> Read v. Huff, 40 N. J. Eq. 329; Vreeland v. Vreeland, 49 N. J. Eq. 322; Coxe v. Smith, 4 Johns. Ch. 271; Lucas v. King, 10 N. J. Eq. 377.

## CHAPTER XX.

### FEIGNED ISSUES.

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| <p>§ 649. Nature of feigned issues.</p> <p>650. Constitutional right to a jury trial.</p> <p>651. The same subject continued — In Indiana.</p> <p>652. The same subject continued — In Illinois.</p> <p>653. The same subject continued — In Pennsylvania, South Carolina, Georgia and Tennessee.</p> <p>654. Jurisdiction of federal courts in equity as affected by right to jury trial.</p> <p>655. Right of a defendant in Massachusetts.</p> <p>656. Waiver of right to a jury trial.</p> <p>657. Constitutional right to trial by court.</p> <p>658. Issue upon question of mental capacity.</p> | <p>§ 659. Awarding an issue discretionary.</p> <p>660. When issues are properly awarded.</p> <p>661. The same subject continued.</p> <p>662. Proper time for applying for issues.</p> <p>663. Framing issues and directions for trial.</p> <p>664. Trial of an issue.</p> <p>665. Certifying the verdict.</p> <p>666. Effect of the verdict.</p> <p>667. Exceptions.</p> <p>668. Application for new trial.</p> <p>669. The same subject continued.</p> <p>670. Proceedings after trial.</p> <p>671. Distinction between an issue and an action.</p> |
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§ 649. Nature of feigned issues.— A feigned issue is a mode adopted from the civil law as a means of having some question of fact, arising incidentally and to be the foundation of some other order or decree in a cause, determined by the verdict of a jury.<sup>1</sup> Courts of equity may decide both facts and law; but they may if they see fit direct a verdict by a jury upon any single fact, or upon all the matters in dispute.<sup>2</sup> But such a verdict is not binding upon the judgment of the court — it is advisory simply, and the court may disregard it entirely or adopt it either in part or *in toto*.<sup>3</sup> Upon an inter-

<sup>1</sup> American Dock Co. v. Trustees Garred v. Beall, 92 U. S. 684; Bailey &c., 37 N. J. Eq. 267. v. Sewell, 1 Russ. 289.

<sup>2</sup> Kohn v. McNulta, 147 U. S. 238, <sup>3</sup> Kohn v. McNulta, 147 U. S. 238, 240; Bryan v. Parker, 1 Y. & C. 170; 240. See § 666, *infra*.



vention in railway foreclosure proceedings to recover damages against the receiver for personal injuries to an employee, the court has authority to send to a jury the single issue as to the amount of the damages, in case there is any liability; but the court may in its discretion set the verdict aside, and dismiss the intervening petition.<sup>1</sup>

§ 650. **Constitutional right to a jury trial.**— Under the English practice a reference of an issue of fact to a jury was imperative only in the case of an heir at law, a rector or a vicar.<sup>2</sup> In the United States there appears to be no absolute right to a jury trial in cases clearly within the equity jurisdiction, even for the defendant; and the only difficulty lies in determining what cases were and what were not tried by a jury prior to the adoption of the constitution.<sup>3</sup> It was said in New York that “where the plaintiff brings an action for both legal and equitable relief in respect to the same cause of action, the case presented is not one of right triable by jury under the constitution.”<sup>4</sup>

§ 651. **The same subject continued—In Indiana.**— In Indiana “it is only in suits that formerly were of exclusive equitable jurisdiction that a jury is not demandable by

<sup>1</sup> *Kohn v. McNulta*, 147 U. S. 238; *a. c.*, 18 S. W. Rep. 298. The practice of referring doubtful questions to a jury is not confined to cases where witnesses are to be introduced. It may be resorted to where the decision must be upon written evidence. *Lee v. Beatty*, 8 Dana, 212.

<sup>2</sup> *Daniell's Ch. Pr.* (5th ed.) 1074, 1075; *Brown v. Miner*, 128 Ill. 148, 154.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), § 82, n. a.

<sup>4</sup> *Per Andrews, J.*, in *Cogswell v. New York &c. R. Co.*, 105 N. Y. 819, 821, quoted in *Bergman v. Manhattan Ry. Co.*, 14 N. Y. Supl. 884. See *Davison v. Ferry Co.*, 71 N. Y. 883; *New York &c. R. Co. v. Schuyler*, 84 N. Y. 80, 46; *Baird v. Mayor &c.*, 74 N. Y. 382; *Acker v. Leland*, 109 N. Y.

5, 10; *Riggs v. Shannon*, 16 N. Y. Supl. 980; *Stone v. Welles*, 128 N. Y. 655; *Pendergast v. Greenfield*, 127 N. Y. 23; *Hudson v. Caryl*, 44 N. Y. 558; *Wheelock v. Lee*, 74 N. Y. 495; *Bradley v. Aldrich*, 40 N. Y. 505. See further, as to the present *status* of trial by jury in equity cases under the New York code and constitution and late amendments to the code (*L. 1891, ch. 208*), the note to *Mellen v. Mellen*, 27 Abb. N. C. 99, 101, and cases there cited; *Titman v. Twelfth Ward Bank*, 58 Hun, 610; *Jefferson v. New York El. R. Co.*, 58 Hun, 608. In Missouri, where issues both of legal and equitable cognizance are so blended as to make the entire action properly an equitable one, it is not error to refuse a trial by jury. *Kortjohn v. Seimers*, 29 Mo. App. 371.

either party for the trial of the issues of fact. The question whether or not the case is one in which a jury may be demanded depends upon the jurisdiction invoked. If the remedy sought be equitable the court cannot be required to call a jury. If it be legal the trial is by jury unless the jury be waived."<sup>1</sup>

§ 652. The same subject continued — In Illinois.— In Illinois the right to a trial by jury is preserved as it existed before the adoption of the constitution. The constitution does not affect the uniform practice in equity to hear and determine causes without a jury.<sup>2</sup> Hence the Burnt Records Act of Illinois, which confers jurisdiction on courts of chancery to establish and confirm titles where the records have been destroyed, has been held not to be unconstitutional in depriving a party of the right to trial by jury.<sup>3</sup>

<sup>1</sup> *Robertson v. McPherson* (Ind.), 81 N. E. Rep. 478, holding that where the facts stated in the complaint present no ground for a specific decree, and it is sought to recover compensation by way of damages only, it is proper to submit the cause to a jury. See, also, *Brighton v. White*, 128 Ind. 320, 323; *Evans v. Nealis*, 87 Ind. 262; *Martin v. Martin*, 118 Ind. 227; *Carmichael v. Adams*, 91 Ind. 526; *Kimble v. Seal*, 92 Ind. 276; *Rogers v. Union &c. Co.*, 111 Ind. 843, 846; *Field v. Holzman*, 98 Ind. 205; *Quarl v. Abbott*, 102 Ind. 283, 289; *Brown v. Russell*, 105 Ind. 46, 55; *Albrecht v. Lumber Co.*, 126 Ind. 318; *Ex parte Sweeney*, 126 Ind. 588; *Coleman v. Floyd* (Ind.), 81 N. E. Rep. 75; *Garrard v. Garrard* (Ind.), 84 N. E. Rep. 442. In *People v. Havird* (Idaho Ter.), 25 Pac. Rep. 294, it was held that an action to try title to an office to which there are several claimants is one of legal and not of equitable cognizance, and the trial of the issue by a jury is a constitutional right. Citing *People v. Railroad Co.*, 57 N.

Y. 161, and distinguishing *State v. Lupton*, 64 Mo. 415. See *Roussain v. Patten* (Minn.), 48 N. W. Rep. 1122.

<sup>2</sup> *Heacock v. Hosmer*, 109 Ill. 244.

<sup>3</sup> *Harding v. Fuller* (Ill.), 80 N. E. Rep. 1058; *Bertrand v. Taylor*, 87 Ill. 285; *Heacock v. Lubuke*, 107 Ill. 896; *Gage v. Caraher*, 125 Ill. 447; *Robinson v. Ferguson*, 78 Ill. 539; *Mulvey v. Gibbons*, 87 Ill. 367. In *Hahn v. Huber*, 88 Ill. 244, the court held that on a bill to foreclose a mortgage a motion to submit the question of the insanity of a mortgagor to a jury without any affidavit of the fact of his insanity was properly overruled. Revised Statutes of Illinois, chapter 148, section 7, require the submission to a jury of an issue arising upon the contest of a will on the ground of insanity of the testator or of his want of mental capacity, and this provision is imperative. *Meeker v. Meeker*, 75 Ill. 260; *Long v. Long*, 107 Ill. 211. Aside from the statute the practice seems to be sanctioned in all cases involving questions of insanity. *Myatt v. Walker*,

§ 653. The same subject continued — In Pennsylvania, South Carolina, Georgia and Tennessee.— In Pennsylvania the legislature cannot vest in the court of chancery acting without a jury the power to determine upon the legal rights of parties unless there exists some equitable ground of relief.<sup>1</sup> In South Carolina it is the practice, where legal and equitable issues are presented in the same case, to separate them and have each tried by its appropriate tribunal.<sup>2</sup> Hence, even if the answer sets up an equitable defense, the defendant does not thereby lose his right to have the purely legal claim stated by the plaintiff tried by a jury.<sup>3</sup> In Georgia “the interposition of juries in the trial of chancery causes is purely a matter of legislative regulation.”<sup>4</sup> In Tennessee there is no constitutional right to trial by jury in equity cases.<sup>5</sup>

§ 654. Jurisdiction of federal courts in equity as affected by right to jury trial.— The seventh amendment to the constitution of the United States declares that “in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” In the federal courts this right cannot be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim properly cognizable at law of a demand for equitable relief in aid of the legal action or during its pendency.<sup>6</sup> The United States Revised Statutes

44 Ill. 485. But it is nevertheless strictly a matter of pure discretion. *Brown v. Miner*, 128 Ill. 148, 155.

<sup>1</sup> *North Penn. Coal Co. v. Snowden*, 42 Pa. St. 488; *Norris' Appeal*, 64 Pa. St. 275; *Tillmes v. Marsh*, 67 Pa. St. 507; *Haines' Appeal*, 78 Pa. St. 169.

<sup>2</sup> *Adickes v. Lowry*, 12 S. C. 108.

<sup>3</sup> *Smith v. Brice*, 17 S. C. 538. See further, as to right to trial by jury in South Carolina, *Capell v. Moses* (S. C.), 15 S. E. Rep. 711; *DeWalt v. Kinard*, 19 S. C. 290; *Reams v. Spann*, 28 S. C. 538; s. c., 6 S. E. Rep. 335; *Carrigan v. Evans*, 81 S. C. 292; s. c., 9 S. E. Rep. 852; *Sale v. Meggett*, 25 S. C. 72. And as to

waiver of the right, *Smith v. Bryce*, 17 S. C. 538; *Williams v. Charleston*, 7 S. C. 77; *Powers v. McEachern*, 7 S. C. 290; *Kirkland v. Cureton*, 4 S. C. 122; *Meetze v. Railroad Co.*, 28 S. C. 14; § 656, *infra*. But feigned issues according to the former practice in chancery are not now allowed in South Carolina. Code of Civil Procedure, § 92.

<sup>4</sup> *Mahan v. Cavender*, 77 Ga. 118, 121.

<sup>5</sup> *Gibson's Suits in Chancery*, § 532, n. 2; *McGinnis v. State*, 9 Humph. 58; *Goddard v. State*, 2 Yerg. 99; *Jackson v. Nimmo*, 8 Lea. 613.

<sup>6</sup> *Scott v. Neely*, 140 U. S. 106.

also provide that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."<sup>1</sup> "All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions and can be brought in the federal courts only on their law side. Demands of this character do not lose their character as claims cognizable in the courts of the United States only on their law side because in some State courts by virtue of State legislation equitable relief in aid of the demand at law may be sought in the same action."<sup>2</sup> The code of Mississippi gives to a simple contract creditor a right to seek in equity, in advance of any judgment or legal proceedings upon his contract, the removal of obstacles to the recovery of his claim caused by fraudulent conveyances of property, treating the whole suit, including the determination of the validity of the contract and the amount due thereon, as a suit in equity, to be heard and disposed of without a trial by jury. It also provides that the "creditor shall have a lien upon the property described therein from the filing of his bill." It was contended in *Scott v. Neely*,<sup>3</sup> a suit commenced in a federal court, that the statute created a new equitable right in the creditor,<sup>4</sup>

<sup>1</sup> U. S. R. S., § 723, a re-enactment of the sixteenth section of the Judiciary Act of 1789.

<sup>2</sup> *Scott v. Neely*, 140 U. S. 106, followed in *Cates v. Allen*, 149 U. S. 451; *Atlantic & C. R. Co. v. Western Ry. Co.* (C. C. App.), 50 Fed. Rep. 790; *Talley v. Curtain*, 54 Fed. Rep. 48, 50.

<sup>3</sup> 140 U. S. 106.

<sup>4</sup> Prior to the enactment in question it was well settled in Mississippi that a simple contract creditor, without a specific right or equity in the property, could not maintain such a bill. *Partee v. Mathews*, 53 Miss. 140; *Fleming v. Grafton*, 54 Miss. 79. See, also, generally, as to the necessity of a lien or specific right by judgment

or otherwise, *Balch v. Wastall*, 1 P. Wms. 445; *Cuyler v. Moreland*, 6 Paige, 273; *Bethell v. Wilson*, 1 Dev. & Bat. (Eq.) 610; *Neate v. Duke of Marlborough*, 8 Myl. & C. 407; *Edgell v. Haywood*, 8 Atk. 852, 857; *Smith v. Hurst*, 10 Hare, 80, 43; *Webster v. Clark*, 25 Me. 813, 815; *Cornell v. Radway*, 23 Wis. 260; *Stone v. Manning*, 2 Scam. (Ill.) 530; *Farned v. Harris*, 11 Sm. & M. 366; *Brown v. Bank*, 81 Miss. 454, 458; *Smith v. Railroad Co.*, 99 U. S. 898, 401; *Angell v. Draper*, 1 Vern. 398, 399; *Shirley v. Watts*, 8 Atk. 200; *Wiggins v. Armstrong*, 2 Johns. 144; *McElwain v. Willis*, 9 Wend. 548, 556; *Crippen v. Hudson*, 8 Kernan, 161; *Jones v. Green*, 1

which, being capable of assertion by proceedings in conformity with the pleadings and practice in equity, would be enforced in the federal courts;<sup>1</sup> but it was held in an opinion by Justice Field upon a discussion of the principles which determine the jurisdiction of chancery to enforce the application of property to the satisfaction of legal demands that a federal court sitting in equity had no jurisdiction of the suit.<sup>2</sup> The same question came before the court in *Cates v. Allen*,<sup>3</sup> a case removed from a Mississippi court to a federal court, and a majority of the court declined to recede from the rule laid down in *Scott v. Neely*.<sup>4</sup>

Wall. 330. *Cf.* *Talley v. Curtain*, 54 Fed. Rep. 43; *Pullman v. Stebbins*, 51 Fed. Rep. 10.

<sup>1</sup> See §§ 6, 7, *supra*.

<sup>2</sup> *Scott v. Neely*, 140 U. S. 106, distinguishing *Clark v. Smith*, 13 Pet. 195, and *Holland v. Challen*, 110 U. S. 15 (explained in *Whitehead v. Shattuck*, 138 U. S. 146), and pointing out that if the fact that the statute gave the complainant a lien upon the filing of his bill were to be deemed sufficient to confer jurisdiction, all actions at law, even for injuries to persons or property, might be thus withdrawn by the State from a court of law to a court of equity by providing for a similar lien.

<sup>3</sup> 149 U. S. 451.

<sup>4</sup> *Cates v. Allen*, 149 U. S. 451. Justices Brown and Jackson dissented upon the ground (1) that the debt was merely an incidental feature of the bill; (2) that the statute gave a lien upon the property, "a fact which in the Case of Beauregard, 101 U. S. 688, was held to obviate the necessity of a prior judgment and execution;" (3) that the statute gave a substantial right enforceable according to the rule established by the decisions in the federal courts; (see §§ 6, 7, *supra*); (4) that by the removal acts the duty to remand a cause which it appears "does

not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court" is "limited to disputes or controversies not within the jurisdiction of the circuit court by reason of the requisite citizenship not really existing, or being collusively obtained, as in *Hawes v. Oakland*, 104 U. S. 450, or where upon an examination of the record the requisite amount is found not to have been involved, as in *Walter v. Northeastern R. Co.*, 147 U. S. 370." See § 83, *supra*. Subsequent to the enactment of the Mississippi statute out of which the litigation arose, that State adopted a new constitution which became operative November 1, 1890, wherein it is provided that "no judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction." The statutory provision was thus cured of any constitutional defect. *Scott v. Francis Vandergrift Shoe Co. (Miss.)*, 10 So. Rep. 455. See *Talley v. Curtain*, 54 Fed. Rep. 43.

§ 655. **Right of a defendant in Massachusetts.**—In Massachusetts it is unsettled whether the defendant in every case in equity has a constitutional right to a trial by jury if he demands it.<sup>1</sup> But the practice of the court has been general to order issues to be framed upon the application of the defendant, when the right sought to be enforced by a proceeding in equity is essentially a common-law right, and where the facts in dispute are such as were tried by a jury according to the use and practice at the time of and before the adoption of the constitution.<sup>2</sup>

§ 656. **Waiver of right to a jury trial.**—It is well settled that if a party to a suit in equity is entitled as of right to have issues framed for a jury he waives such right, unless it is seasonably asserted.<sup>3</sup> After a cause has been heard,<sup>4</sup> or set down to be heard, by the court,<sup>5</sup> without requesting a trial by jury; or after the cause has been referred to a master and a hearing had before him,<sup>6</sup> or his report has been filed,<sup>7</sup> it is too late to insist upon a jury trial as of right. Under the Indiana statute providing for a waiver of a jury trial, among other

<sup>1</sup> *Merchants' Nat. Bank v. Moulton*, 143 Mass. 548; s. c., 10 N. E. Rep. 251; *Dole v. Woodredge*, 142 Mass. 161.

<sup>2</sup> *Merchants' Nat. Bank v. Moulton*, 143 Mass. 548; s. c., 10 N. E. Rep. 251, which case, together with the following, illustrate the practice:—*Franklin v. Greene*, 2 Allen. 520; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Harris v. Mackintosh*, 183 Mass. 228; *Powers v. Raymond*, 187 Mass. 488.

<sup>3</sup> *Parker v. Nickerson*, 187 Mass. 487; *American Dock Co. v. Trustees &c.*, 37 N. J. Eq. 267; *Freichnecht v. Meyer*, 39 N. J. Eq. 551, 556, citing *Palys v. Jowett*, 32 N. J. Eq. 302, "a case standing on the very verge of the rule."

<sup>4</sup> *Blanchard v. Cooke*, 147 Mass. 215; *Peterson v. Ruhnke*, 46 Minn. 115. Where a demurrer and an an-

swer were filed on the same day, and counsel agreed upon a time for hearing the "action," the court properly refused a jury trial, and the framing of the issues therefor, although when the agreement was made the demurrer was still pending and no replication had been filed. *Stratton v. Hennon*, 154 Mass. 810; s. c., 28 N. E. Rep. 269.

<sup>5</sup> *Dole v. Woodredge*, 142 Mass. 161, holding that a subsequent amendment to the bill, and a new answer demanding a jury trial, did not change the effect of the waiver.

<sup>6</sup> *Freeland v. Wright*, 154 Mass. 492; s. c., 28 N. E. Rep. 678.

<sup>7</sup> *Parker v. Nickerson*, 187 Mass. 487, 492; *Shaw v. Norfolk County*, 11 Gray, 407. See, also, *Atlanta Mills v. Mason*, 120 Mass. 244; *Nichols v. Ela*, 124 Mass. 383; *Hoitt v. Burleigh*, 18 N. H. 889.

modes, by "oral consent," it seems that a failure to object to trial by the court is such a consent.<sup>1</sup>

§ 657. **Constitutional right to trial by court.**—The Supreme Court of Michigan, in condemning a statute which accorded to the verdict of a jury in a chancery case the same weight as a verdict at law, said that "any change which transfers the power that belongs to a judge to a jury . . . is as plain a violation of the constitution as one which should give the courts executive or legislative power vested elsewhere. The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our constitution must remain vested where it always has been vested heretofore."<sup>2</sup>

§ 658. **Issue upon question of mental capacity.**—Persons of weak or unsound mind who have not been judicially declared to be such may sue in chancery by a next friend. Where an action has been thus brought by one styling himself as next friend of an adult person alleged to be of unsound mind, and the person in whose behalf the action purports to be brought appears in court and protests that he is of sound mind, and that the suit was instituted and prosecuted without his authority and against his will, the chancellor must issue his writ out of chancery directing an inquiry by a jury as to whether the mind of the person is so impaired as to render him incapable of taking care of his own interests. If the verdict of the

<sup>1</sup> *Hauser v. Roth*, 87 Ind. 89. See, Judge, 75 Mich. 274, 285, holding that also, *Griffin v. Pata*, 68 Ind. 278; *MacKellar v. Rogers*, 109 N. Y. 468; s. c., 17 N. E. Rep. 350. Cf. *Shaw v. Kent*, 11 Ind. 80. So, if no objection is made to a jury trial of an issue, it is a waiver of a right to a trial by the court. *Sheets v. Bray*, 125 Ind. 83. Or if the objection is too broad, as covering both legal and equitable issues. *Puterbaugh v. Puterbaugh* (Ind.), 80 N. E. Rep. 519; *Lindley v. Sullivan* (Ind.), 82 N. E. Rep. 788; *Lace v. Fixen*, 89 Minn. 46; *Greenleaf v. Egan*, 80 Minn. 316.

<sup>2</sup> *Brown v. Kalamazoo Circuit* Judge, 48; s. c. 27 Abb. N. C. 478.

jury be in the affirmative, the chancellor should appoint a committee for the person and allow such committee to prosecute the suit in his name. But if the verdict be in the negative, then the suit should be dismissed, unless the court from the evidence before the jury should deem it proper to take other steps in the matter.<sup>1</sup>

**§ 659. Awarding an issue discretionary.**—The awarding of an issue to a jury in equity causes of purely equitable cognizance, in aid of the chancellor, is always addressed to his discretion;<sup>2</sup> and the appellate court will not undertake to control his discretion in that behalf,<sup>3</sup> unless there has been a palpable abuse of that discretion.<sup>4</sup> Where a court obtains jurisdiction under the "Burnt Records Act" of Illinois to es-

<sup>1</sup>Howard v. Howard, 87 Ky. 616, holding that it was error not to take the course indicated in the text; but the person alleged to be of unsound mind having died pending the appeal, the court declined to reverse for an error which in no manner affected the rights of the heirs, who had revived the suit and were interested in having the judgment of the court below affirmed.

<sup>2</sup>Stockbridge Iron Co. v. Hudson Iron Co., 102 Mass. 45; Smith v. Brush, 1 Johns. Ch. 459; Wilson v. Riddle, 123 U. S. 608; Koons v. Blanton (Ind.), 27 N. E. Rep. 334; Rice v. Goodwin (Colo.), 30 Pac. Rep. 330; Cole v. Bean, 1 Ariz. 377; s. c., 25 Pac. Rep. 538; Barton v. Barbour, 104 U. S. 126; Acker v. Leland, 109 N. Y. 5; s. c., 15 N. E. Rep. 748; Brigham v. Gott, 3 N. Y. Supl. 518; Greer v. Powell, 1 Bush, 489, 499; Head v. Head, 8 Mon. 120; Baltzell v. Hall, 1 Litt. 98.

<sup>3</sup>Adams v. Munter, 74 Ala. 338; Phillips v. Edsall, 127 Ill. 585; s. c., 20 N. E. Rep. 301; South Park Comm'rs v. Phillips, 27 Ill. App. 380, 383, citing Dowden v. Wilson, 71 Ill. 485; Russel v. Paine, 45 Ill. 350;

Milk v. Moore, 39 Ill. 584; Flaherty v. McCormick, 113 Ill. 538; Black v. Shreve, 18 N. J. Eq. 455, 467.

<sup>4</sup>Blakey v. Johnson, 13 Bush, 197; Newark &c. R. Co. v. Mayor &c., 23 N. J. Eq. 515, 524. "In the American courts we know of no practice establishing an issue as a matter of right." Patterson v. Gaines, 6 How. 550, 584. But it was said in McLaughlin v. Bank of Potomac, 7 How. 228, that if the issue be one of mere law, or idle, or impertinent, it is erroneous. In Massachusetts the propriety of awarding an issue is subject to revision on appeal. Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Harris v. Mackintosh, 133 Mass. 228; Brooks v. Tarbell, 103 Mass. 496. In Virginia "the appellate court must judge whether or not such discretion has been soundly exercised, whenever the ruling implicitly involves a settlement of the principles of the cause." Carter v. Carter, 82 Va. 624. See, also, Fishburne v. Ferguson, 84 Va. 87; s. c., 4 S. E. Rep. 575; Robinson v. Allen, 85 Va. 721; s. c., 8 S. E. Rep. 385; De Vaughn v. Hustead, 27 West Va. 773.



tablish title to real estate, it may adjudicate and determine in equity all the issues between the parties relating to the property, as well those at law as those in equity; and it is entirely within its discretion whether it will or will not send the issues at law to be determined by a jury.<sup>1</sup>

§ 660. When issues are properly awarded.—“The following are the principal cases wherein a trial by jury is appropriate:—(1) Where the evidence is so contradictory, or so nearly balanced, that an open and rigid cross-examination of the witnesses before a jury is necessary for the ascertainment of the truth;<sup>2</sup> (2) where the genuineness of a deed, will, note of

<sup>1</sup>Gormley v. Clark, 184 U. S. 338. An issue at law is discretionary with the chancellor, where a defendant in a court of law applies for an injunction against a judgment, upon facts in relation to which the proof is contradictory. Key v. Knott, 9 Gill & Johns. 342. See Foote v. Silsby, 1 Blatch. 545. So upon a bill of review. Elliott v. Balcom, 11 Gray, 286. See further, Lincoln v. Price, 1 Hill Ch. 481; Fernie v. Young. L. R. 1 H. of L. 68; note to Cairo & Fulton R. Co. v. Titus, 35 N. J. Eq. 385.

<sup>2</sup>Townsend v. Graves, 3 Paige, 458; Bassett v. Johnson, 8 N. J. Eq. 417; Flesler v. Porch, 10 N. J. Eq. 256; Hess v. Calender, 120 Pa. St. 188; s. c., 18 Atl. Rep. 720. A commissioner appointed by the court to ascertain the value of a horse killed by the negligence of the railroad company of which defendant was receiver, found in his first report, which was set aside, that the horse was worth \$40,000, and in his second, which was approved, that the horse was worth only \$1,000. The evidence before the commissioner clearly not sustaining his second report, and the evidence for plaintiffs not sustaining the first, it was held that both should be set aside and an issue framed for a jury. Melendy v. Barbour, 78 Va. 544. In

Beverly v. Waldron, 20 Gratt. 149, the court said:—“It seems to be the well-settled rule that in no case ought an issue to be ordered to enable a party to obtain evidence to make out his case; that when the allegations of the bill are positively denied by the answer, and the plaintiff fails to furnish two witnesses, or one witness and corroborating circumstances, in support of his bill, it is wrong in the chancellor to order an issue; that no issue should be ordered until the plaintiff has thrown the burden of proof on the defendant; that until the *onus* is shifted and the case rendered doubtful by the conflicting evidence of the opposing parties, the defendant cannot be deprived by the order of the court for an issue of his right to a decision by the court on the case made by the pleadings and evidence.” Quoted and approved in Carter v. Carter, 82 Va. 624, 638; Sands v. Beardsley, 32 West Va. 594. Where, on appeal, one judge thought an issue ought not to have been ordered because the evidence established a certain state of facts, while another judge thought it ought not to have been ordered because, in his opinion, the evidence established an opposite state of facts, it was held that this disagreement jus-

hand, bill of sale or other written instrument is in issue; (3) where questions of sanity, duress, fraud, usury and failure of consideration are involved; (4) where the defense of adverse possession is interposed in an ejectment suit;<sup>1</sup> (5) where the question in issue is the dividing line between two tracts or lots of land; (6) where unliquidated damages are to be assessed;<sup>2</sup> (7) where a deed or bill of sale is alleged to have been given as a mere mortgage; (8) where the fact of marriage or the legitimacy of children is in issue."<sup>3</sup>

§ 661. Same subject continued.— An action to set aside a composition deed, and to vacate an order discharging an assignee on the ground of fraud, and to obtain an order for the payment in full of plaintiff's claim, and for the appointment of a receiver, is an equitable action, and the sending of issues to a jury being discretionary in such case, the court will not send the issues to a jury where they are very numerous, and involve intricate questions of law, and many of them have been decided as to some of the parties in another action.<sup>4</sup> Where a large number of issues will arise in an action by a tax-payer to enjoin the purchase of property by a city, on the ground that it is a waste of public funds, a court of equity, in the

tified the ordering an issue. *Pickens v. McCoy*, 24 West Va. 344. Where the court is in doubt as to a controlling fact, upon the pleadings and proofs, a feigned issue may be awarded without any motion from either party. *Black v. Lamb*, 12 N. J. Eq. 108; *Munson v. Reed*, Clarke's Ch. 580; *Meek v. Spracher*, 87 Va. 162; s. c., 12 S. E. Rep. 397; or upon motion of the plaintiff without notice to the defendant. *Rynerson v. Allison*, 28 S. C. 81; s. c., 5 S. E. Rep. 218, holding, however, that it is the duty of the court, where the testimony as to facts is not doubtful, to decide upon questions of fact without awarding a feigned issue; on which point see, also, *Carlisle v. Cooper*, 18 N. J. Eq. 241; *Dale v. Roosevelt*, 6 Johns. Ch. 255; *De Vaughn v. Hu- stead*, 27 West Va. 773; *Kearney v.*

*Harrell*, 5 Jones' Eq. 199. There is no reason for submitting to a jury a question of fact whether a will has been canceled or surreptitiously destroyed where the evidence is such as to create no embarrassing doubt in the mind of the court. *Hildreth v. Schillinger*, 10 N. J. Eq. 196.

<sup>1</sup>See *Santee Cypress Lumber Co. v. James*, 50 Fed. Rep. 360.

<sup>2</sup>*Moore v. Martin*, 1 B. Mon. 97, an action for unliquidated damages for services rendered.

<sup>3</sup>*Gibson's Suits in Chancery*, § 538; citing 2 *Daniell's Ch. Pr.* (5th ed.) 1072, n. 5. See, also, *Adams' Equity* (7th Am. ed.), 376, n. The submission of the entire case to a jury is contrary to practice. *Milk v. Moore*, 39 Ill. 589.

<sup>4</sup>*Blunt v. Hibbard*, 3 N. Y. Supl. 121.

exercise of its discretion, will not submit questions of fact arising on the pleadings to the determination of a jury.<sup>1</sup> In a suit in equity to subject the assets of a partnership to the payment of firm debts, where there was conflicting evidence as to the existence of the partnership, and there was no application to the court to direct an issue to try such question, the fact that the court did not direct an issue was not error.<sup>2</sup> When the amount in controversy is small, and the facts can be satisfactorily ascertained by the court, an issue at law will not be awarded.<sup>3</sup> The power should be sparingly exercised.<sup>4</sup>

**§ 662. Proper time for applying for issues.**—The usual time for applying for a feigned issue is at the hearing,<sup>5</sup> but there have been cases in which it has been ordered on a previous motion.<sup>6</sup> It has also been granted at a hearing for further directions.<sup>7</sup> It may be directed upon exceptions to a

<sup>1</sup> *Ziegler v. Chapin*, 14 N. Y. Supl. 264.

<sup>2</sup> *Robinson v. Allen*, 85 Va. 721; s. c., 8 S. E. Rep. 885.

<sup>3</sup> *Garwood v. Adm'rs of Eldridge*, 2 N. J. Eq. 290.

<sup>4</sup> *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 118; *Brownlee v. Martin*, 21 S. C. 892. "Although this court in the exercise of a sound discretion has a right to decide every matter of fact which comes before it without the intervention of a jury, yet there are some cases in which important rights depending upon a mere question of fact ought not to be decided without giving the defendant who has not come voluntarily into this court an opportunity to establish his claims before a jury." Chancellor Walworth in *Apthorp v. Comstock*, 2 Paige, 482, 484.

<sup>5</sup> *Fullagas v. Clark*, 18 Vea. 481; *Hoffman's Ch. Pr.* (2d ed.) 503. See *Goodyear v. Providence Rubber Co.*, 2 Fish. Pat. Cas. 499; s. c., 2 Cliff. 851; *Charles River Bridge v. Warren*

*Bridge*, 7 Pick. 869, 870; *Dole v. Wooldredge*, 142 Mass. 161, 182. The application is premature before the pleadings are closed. *Tibbets v. Perkins*, 20 N. H. 275. Under Code of Alabama, 1876, section 3890, providing for a reference to a jury in chancery proceedings when "necessary," it was error for the chancellor, on an application for injunction, to refer an issue of fact to a jury before any testimony had been taken. *Rice v. Tobias*, 88 Ala. 848; s. c., 8 So. Rep. 670. Although, under a rule of court, an application to settle issues is required to be made within ten days after issue joined, the court may order issues to be settled after that time. *Apel v. O'Connor*, 89 Hun, 482.

<sup>6</sup> *Attorney-General v. Lane*, 2 Anst. 589; *Kent v. Burgess*, 11 Sim. 361; *Middleton v. Sherburne*, 4 Y. & C. 358; *Gardiner v. Rowe*, 4 Madd. 286; *Townley v. Deare*, 8 Beav. 218; *De Tastet v. Bordenave*, Jac. 516; *Lancashire v. Lancashire*, 9 Beav. 259.

<sup>7</sup> *New Orleans & Co. v. Dudley*, 8 Paige, 452.

master's report where the court has great doubts.<sup>1</sup> In Tennessee it was held, construing the provisions of the code, that the demand for a jury may be made at any time before the case is in fact heard by the chancellor.<sup>2</sup>

§ 663. Framing issues and directions for trial.—The form of an issue was formerly that of an action on a wager, assumed to have been made respecting the fact in dispute; but this fiction is now dispensed with,<sup>3</sup> and the better practice is to refer the questions to the jury in the direct form of interrogatories.<sup>4</sup> If the parties differ as to the form of the issue it is usually settled by a master.<sup>5</sup> A party who has agreed to

<sup>1</sup> *Kemp v. Mackrell*, 2 Ves. Sr. 579. The court may direct an issue to be tried by a jury without expressly revoking a previous order of reference to auditors. *Field v. Holland*, 6 Cranch, 8.

<sup>2</sup> Code Tenn., §§ 4465-4470; *Cheat-ham v. Pearce* (Tenn.), 15 S. W. Rep. 1080; *Laudon v. Laudon*, 1 Humph. 4; *Lowe v. Trainor*, 6 Cold. 635; *Morris v. Swaney*, 7 Heisk. 592; *Miller v. Farris*, 12 Heisk. 451; *Johnson v. Warden*, Tenn. Leg. Rep. 26; *Pearce v. Suggs*, 85 Tenn. 728. See, further, as to the proper time for applying for a jury, *Louisiana State Bank v. Duplessis*, 2 La. Ann. 651; *Gallagher v. Hebrew Congregation*, 34 La. Ann. 526.

<sup>3</sup> *Adams' Equity* (7th Am. ed.), 876; 8 & 9 Vict., ch. 109, 19. See especially a clear statement of the practice in *Dorr v. Tremont Nat. Bank*, 128 Mass. 349, 357.

<sup>4</sup> *Cooper v. Stockard*, 16 Lea, 144; *Gibson's Suits in Chancery*, § 585. But the issues may be in the form of pleadings at law. *James v. Brooks*, 6 Heisk. 150. See, also, *Lancaster v. Ward*, 1 Tenn. (Overton), 480. Whether an order is for an action at law or an issue out of chancery does not depend upon the form in which the issue is framed. For convenience of trial the issue must be given the

form of a common-law action, with appropriate pleadings at law to raise an issue; but the nature and purpose of the issue give it character as a feigned issue or otherwise, and not the form in which the issue is expressed. *American Dock Co. v. Trustees &c.*, 37 N. J. Eq. 267. In *Crabbe v. Larkin*, 9 Bush, 164, it was held not necessary that the issue should be formed by the pleadings. But in *Horner v. Davis*, 10 Bush, 860, the court said the issues should always be made up from the pleadings. See the case cited in the preceding note.

<sup>5</sup> 2 Daniell's Ch. Pr. (1st ed.) 786; Hoffman's Ch. Pr. (2d ed.) 506. Though the form of an issue framed for the jury whether a conveyance was made with intent to hinder, delay or defraud "the creditors of C., including plaintiff," can hardly be construed as obliging plaintiff to show that C., in making the conveyance, had in mind the fraudulent intent to defraud this particular plaintiff, still, to avoid possible objection, it will be modified so that the inquiry shall be:—Was the conveyance with intent to defraud, etc., (1) "the then existing creditors of C.;" (2) "subsequent creditors of C.?" *Miller v. Cobb*, 19 N. Y. Supl. 442. In an action to set aside an as-

the issues cannot afterwards object either to their form or substance,<sup>1</sup> and after verdict it is too late to object to the form of the issue.<sup>2</sup> The decree or order directing the issue either specifies the time when it is to be tried or directs the master to fix the time. If the plaintiff makes default in prosecuting the issue at the time appointed, the court may order it to be taken *pro confesso* against him,<sup>3</sup> or for sufficient cause grant a postponement of the trial.<sup>4</sup> The court will provide that the issues shall effectually raise the real question, cleared of all extrinsic matter, by directing all requisite admissions to be made and compel the parties to produce at the trial all material documents in their possession or power,<sup>5</sup> and may determine what evidence shall be read before the jury,<sup>6</sup> and give directions to the trial court to disregard the strict rules of law,<sup>7</sup> and impose such restrictions generally on the parties as will prevent all fraud or surprise upon the trial of the issue.<sup>8</sup> In directing an issue the court directs the party supporting the affirmative to be the plaintiff in the issue.<sup>9</sup> It is the duty of the defendant in the issue to name an attorney to appear for him on the trial, and if he neglects to do so an order may be obtained that he name an attorney in four days, and that

assignment as in fraud of creditors, the court submitted the following issue: — "Was the assignment made with intent to hinder, delay or defraud the creditors of defendants?" It was held that the disjunctive form of the issue was not prejudicial to defendants, where the court charged that the presence of a fraudulent intent was a prerequisite to an affirmative finding thereon. *Rouse v. Bowlers*, 108 N. C. 182; s. c., 12 S. E. Rep. 985.

<sup>1</sup> *Hoobler v. Hoobler*, 128 Ill. 645; s. c., 21 N. E. Rep. 571.

<sup>2</sup> *Black v. Lamb*, 12 N. J. Eq. 109.

<sup>3</sup> 1 *Barbour's Ch. Pr.* (2d ed.) 463; *Bearblock v. Tyler*, 1 Jac. & W. 225; *Casborne v. Barsham*, 5 Myl. & C. 113; *Hargrave v. Hargrave*, 8 Beav. 289. It seems that compulsory process cannot be resorted to. *Gardiner v. Rowe*, 4 Mad. 236. After an order *pro confesso* the cause should be

set down for further directions and to have the issue taken *pro confesso* pursuant to the order. 1 Newl. Pr. 352.

<sup>4</sup> *Bearblock v. Tyler*, 1 Jac. & W. 225; *Kebl v. Philpot*, 9 Sim. 614.

<sup>5</sup> *Adams' Equity* (7th Am. ed.), 377; *Duke of Beaufort v. Morris*, 2 Phil. 683; *Cart v. Hodgkin*, 3 Swanst. 161. If omitted in the original order such directions may be obtained afterwards upon motion. *Marsh v. Sibbald*, 2 Ves. & B. 375.

<sup>6</sup> *Black v. Shreve*, 18 N. J. Eq. 456. If the order directs all the witnesses to be examined, but the plaintiff declines to call some of them, the judge himself will call them. *Groome v. Chambers*, 2 Mont. & Ayt. 742.

<sup>7</sup> *Black v. Lamb*, 12 N. J. Eq. 108.

<sup>8</sup> *Apthorp v. Comstock*, 2 Paige, 482.

<sup>9</sup> 2 *Daniell's Ch. Pr.* (1st ed.) 786; *Chapman v. Smith*, 2 Ves. 516. See § 664, n. 8, *infra*.

in default the issue be taken as tried and a verdict given for the plaintiff.<sup>1</sup>

§ 664. Trial of an issue.—The course of proceeding upon the trial of an issue is generally the same as that adopted in ordinary trials at law, except where the court of chancery has given any special directions upon the subject.<sup>2</sup> Where an issue is directed, the judge presiding on the trial of the issue cannot grant a nonsuit. He must permit a trial and report back the result.<sup>3</sup> A person who is interested in the result of an issue, but who refuses to be a party to it, may nevertheless be allowed to attend the trial by counsel,<sup>4</sup> and will in such case be included in the order for the production of documents.<sup>5</sup> The original record must be produced on the trial.<sup>6</sup> It seems that the jury should be sworn in the words of the order of issue.<sup>7</sup> On the trial of an issue the general rule is that the plaintiff is entitled to the opening and close.<sup>8</sup>

§ 665. Certifying the verdict.—After the trial of a feigned issue the judge certifies how the verdict was found, and

<sup>1</sup> *Wilson v. Ginger*, 2 Dick. 521.

<sup>2</sup> 2 *Daniell's Ch. Pr.* (1st ed.) 742; *Hoffman's Ch. Pr.* (2d ed.) 511; 1 *Barbour's Ch. Pr.* (2d ed.) 451, 463. Oral testimony is always admitted on the trial. *Savings Bank v. Benton*, 1 Metc. (Ky.) 240; *Reading v. Ford*, 1 Bibb, 839; *Warford v. Camron*, 8 Bibb, 435; *Moore v. Simpson*, 5 Litt. 49.

<sup>3</sup> *Woolfolk v. Graniteville Mfg. Co.*, 22 S. C. 332.

<sup>4</sup> *Pindar v. Smith*, Mad. & Geld. 48.

<sup>5</sup> 2 *Daniell's Ch. Pr.* (1st ed.) 782; 1 *Barbour's Ch. Pr.* (2d ed.) 454.

<sup>6</sup> *Hoffman's Ch. Pr.* (2d ed.) 512; *Gretham v. Bell*, 5 Russ. 161.

<sup>7</sup> 1 *Foster's Federal Practice* (2d ed.) § 304, citing *Wilson v. Barnum*, 1 Wall. Jr. 342.

<sup>8</sup> *Dorr v. Tremont Nat. Bank*, 128 Mass. 349, where the execution by the plaintiff of a certain instrument was in issue, the plaintiff denying the same. In *Santee River Cypress Lumber Co. v. James*, 50 Fed. Rep.

860, the complainant being in possession of land, and the defendant setting up adverse title, the latter was directed to proceed as the actor. "As the verdict of the jury in cases of this character is merely advisory and in no sense binding on the court, it is doubtful if the reversal of the judgment because of instructions given would in any case be justifiable. Certainly not when the record shows affirmatively that the court did not follow the findings of the jury." *Brundage v. Deschler*, 181 Ind. 174; s. c., 29 N. E. Rep. 921, citing *Pence v. Garrison*, 93 Ind. 345, 354; *Koons v. Blanton* (Ind.), 27 N. E. Rep. 334; *Sheets v. Bray*, 125 Ind. 33; s. c., 24 N. E. Rep. 357. Where the facts are undisputed, and the cause is to be decided upon mere questions of law, it is not error for the court to direct the jury what verdict to find. *American Dock & Co. v. Trustees*, 39 N. J. Eq. 410.

whether the same was satisfactory to him.<sup>1</sup> He should not only return the *postea*, but go further and furnish the court with a fair statement of the trial.<sup>2</sup> It is not necessary for him to state the evidence and give a minute history of the trial. All that can be required of him is that he state the general character of the evidence offered, the parts objected to, and the decision made upon those objections, with his charge to the jury.<sup>3</sup> If any difficulty exist in relation to his report, the court will not for this cause grant a new trial, but will call on the judge for an additional report of the case.<sup>4</sup> It seems that the plaintiff in an issue may suffer a nonsuit, and that if he does so advisedly, in consequence of any unforeseen occurrence at the trial which would have rendered further proceedings with it unsafe, the court will grant him a new trial notwithstanding the nonsuit.<sup>5</sup>

§ 666. Effect of the verdict.—The verdict of a jury upon an issue is, generally speaking, treated by the chancellor as conclusive between the parties and a sufficient foundation for a decree.<sup>6</sup> It is not, however, the office of a jury in a court of equity to settle questions of fact definitively and finally, but simply to inform the conscience of the chancellor, who is at liberty to disregard the findings, either by setting them or either of them aside, or by letting them stand, and allowing

<sup>1</sup> Barbour's Ch. Pr. (2d ed.) 454; Trenton Banking Co. v. Rossell, 2 Hoffman's Ch. Pr. (2d ed.) 513; 2 Daniell's Ch. Pr. (1st ed.) 746. A judge

before whom certain issues in equity were tried by a jury acted as chancellor in making the decree; the same proofs being relied on before the jury and the chancellor. It was held that a previous order by the judge submitting the issues to the jury, and a certificate to himself of the result, were unnecessary. *Wilson v. Riddle*, 128 U. S. 608; 8 S. Ct. Rep. 255.

<sup>2</sup> *Bassett v. Johnson*, 2 N. J. Eq. 154. In New Jersey, where an issue is awarded by the court of chancery to be made up in the Supreme Court, the transcript and *postea* must be returned to the court awarding the issue and not to the Supreme Court.

<sup>3</sup> *Bassett v. Johnson*, 2 N. J. Eq. 154. It is not improper for the court to permit a certificate of the evidence adduced on the trial of an issue sent to the law side of the court, with the charge to the jury, to be filed and made a part of the record at the next succeeding term after that at which the decree was rendered. *Kerr v. South Park Commissioners*, 117 U. S. 879.

<sup>4</sup> *Bassett v. Johnson*, 2 N. J. Eq. 154.

<sup>5</sup> *Richards v. Symes*, 2 Atk. 319.

<sup>6</sup> *Hill v. Phillips*, 87 Ky. 169; 2 Daniell's Ch. Pr. (5th ed.) 1147; *Hoffman v. Smith*, 1 Md. 475; *Garsed v. Beall*, 92 U. S. 684.

them more or less weight according to his own view of the evidence in the cause.<sup>1</sup>

§ 667. **Exceptions.**—In the practice of most courts of chancery a bill of exceptions is unknown, and the rulings of a judge presiding at the trial by jury of issues out of chancery

<sup>1</sup>Idaho & Oregon Land &c. Co. v. Axtell, 84 Va. 281; s. c., 4 S. E. Rep. 587; Fisburne v. Ferguson, 84 Va. 87; Love v. Braxton, 5 Call, 537; American P. M. Soc. v. Brooklyn El. R. Co., 46 Hun, 530; MacNaughton v. Osgood, 114 N. Y. 574, 577. The rule was not changed by the New York code. Learned v. Tillotson, 97 N. Y. 6; Colie v. Tift, 47 N. Y. 119; Birdsell v. Patterson, 51 N. Y. 43; Vermilyea v. Palmer, 52 N. Y. 471, 474; Acker v. Leland, 109 N. Y. 5, 10; Madison University v. White, 25 Hun, 490. In Montana the Code of Civil Procedure, section 250, which requires all issues of fact to be tried by a jury, does not change the established principles governing courts of equity in dealing with the finding of a jury on the issue presented; and such a finding may be disregarded in making a decree relating to equitable rights. Arnold v. Sinclair, 12 Mont. 248; s. c., 29 Pac. Rep. 1124. But where either party demands a jury under the Tennessee statute the verdict is conclusive unless a new trial be granted or unless the issue tendered be immaterial. Gibson's Suits in Chancery, § 537. See, also, Hill v. Phillips, 87 Ky. 169. In Massachusetts the verdict is regarded as conclusive unless set aside for good cause shown. Franklin v. Greene, 2 Allen, 519. See, also, Paul v. Paul, 2 Hen. & M. 525; Fitzhugh v. Fitzhugh, 11 Gratt. 210; 2 Daniell's Ch. Pr. (5th ed.) 1147, n. 8; Adams' Equity (7th Am. ed.) 376, n. 1; Marsden v. Brackett, 9 N. H. 336.

Bradbury, 182 U. S. 509, 516; Kohn v. McNulta, 147 U. S. 238, 240; Garces v. Beall, 93 U. S. 684; Prout v. Roby, 15 Wall. 472; Watt v. Starke, 101 U. S. 244; Bacey v. Gallagher, 20 Wall. 670; Allen v. Blunt, 8 Story, 742, 746; Quimby v. Conland, 104 U. S. 420; United States v. Sampersac, 1 Hemp. 118; Armstrong v. Armstrong, 3 Myl. & K. 45, 62, 68; Black v. Shreve, 13 N. J. Eq. 456; Carpenter v. Easton & Amboy R. Co., 26 N. J. Eq. 168; Freeman v. Staats, 9 N. J. Eq. 816; Scheetz's Appeal, 85 Pa. St. 88; Moore v. Payne, 7 Dana, 380; Lee v. Beatty, 8 Dana, 207; Jennings v. Durham, 101 Ind. 391; Brundage v. Deschler, 181 Ind. 174; s. c., 29 N. E. Rep. 921; Snell v. Harrison, 38 Mo. 651; Hulett v. Stockwell, 34 Mo. App. 599; Durkee v. Chambers, 57 Mo. 575; Haggin v. Raymond, 67 Cal. 302; Stockman v. Riverside L. & I. Co., 64 Cal. 57; Shirley v. Shirley, 92 Cal. 44; s. c., 27 Pac. Rep. 1097; Bates v. Gage, 4 Cal. 127; Phfeiffer v. Riehn, 13 Cal. 643; Lowe v. Traynor, 6 Cold. (Tenn.) 633; Humphreys v. Blevins, 1 Tenn. 178; Gass v. Mason, 4 Sneed, 508; Cooper v. Stockard, 16 Lea, 144; Hall v. Linn, 8 Colo. 264; Kirtley v. Marshall Silver Mining Co., 8 Colo. 279; McDonald v. Thompson, 16 Colo. 18; s. c., 26 Pac. Rep. 146; Stahl v. Gotzenberger, 45 Wis. 121; Kelly v. Kelly, 126 Ill. 550; s. c., 18 N. E. Rep. 785; Fanning v. Russell, 94 Ill. 886; Austin v. Bainter, 50 Ill. 308; Sibert v. McAvoy, 15 Ill. 106; Reed v.



can be revised only upon motion for a new trial in the court which ordered the issues.<sup>1</sup> But by the legislation and practice in Massachusetts, bills of exception have long been allowable in cases in equity as well as in actions at common law.<sup>2</sup> In the federal courts "exceptions to rulings are proper to be taken and noted; for upon a view of the whole case the mind of the chancellor may be affected by them; just as it is proper to take and note exceptions to evidence taken by deposition; but a bill of exceptions, as such, has no proper place in the proceedings. The verdict can only be set aside on a motion for a new trial, based, not on mere errors of the judge, but upon review of the whole case as submitted to the jury."<sup>3</sup> If exceptions are taken during the progress of the trial at law, these exceptions must be brought before the court of equity, and there decided, in order to give the Supreme Court cognizance of them when the case is brought up on appeal.<sup>4</sup> A bill of exceptions for exclusion of evidence or improper instructions to the jury, in order to be available before the appellate court, should be accompanied by the evidence or the substance of it stated and made part of the record; only then can it be seen whether the court below had sufficient grounds for being satisfied with the conclusions of the jury.<sup>5</sup>

§ 668. Application for new trial.—If the party against whom the verdict is found is dissatisfied with it and wishes a new trial, his application must be made to the court that awarded the issue.<sup>6</sup> The application must be made within a

<sup>1</sup> 2 Daniell's Ch. Pr. (1st ed.) 746; *Fanning v. Russell*, 94 Ill. 888; *Bootle v. Blundell*, 19 Ves. 500; *Footner v. Figea*, 2 Sim. 819; *Snell v. Loucks*, 18 Barb. 885, where Willard, P. J., said:—"Under the former practice a feigned issue was sometimes awarded by the court of chancery and sometimes by the Supreme Court. When it was directed by the court of chancery, if the party against whom the issue was found was dissatisfied with the verdict, the application for a new trial might be made either to the court of law in which the issue was tried or to the court which directed it. Tidd's

<sup>2</sup> *Dorr v. Tremont Nat. Bank*, 128 Mass. 349, 354. In *Armstrong v. Armstrong*, 8 Myl. & K. 45, a bill of exceptions was argued, the objection to its regularity having been waived.

<sup>3</sup> *Dorr v. Tremont Nat. Bank*, 128 Mass. 349, 354.

<sup>4</sup> *Watt v. Starke*, 101 U. S. 247. See, also, *Johnson v. Harmon*, 94 U. S. 371.

<sup>5</sup> *McLaughlin v. Bank of Potomac*, 7 How. 220.

<sup>6</sup> *Watt v. Starke*, 101 U. S. 247.

<sup>7</sup> *Watt v. Starke*, 101 U. S. 247, 250;

reasonable time,<sup>1</sup> according to the English practice, before the hearing on further directions,<sup>2</sup> but in the New York court

Pr. 805; 1 Arch. Pr. 817; Graham's Pr. (3d ed.) 295, 497. So in *Doe v. Doe*, 1 Johns. Cas. 403, a new trial was granted by the Supreme Court on a feigned issue out of chancery on the ground of newly-discovered evidence. In *Doe v. Doe*, 1 Johns. Cas. 25, an application was made to this court and entertained for a new trial on an issue ordered out of chancery to try the fact of adultery on the ground of exclusion of evidence improperly. In *Den v. Fenn*, 1 Caines' Rep. 487, it was held that relief must be sought in this court to set aside an inquest improperly taken by the circuit on an issue awarded out of chancery. The English practice, it is believed, gave a preference to the motion for a new trial in the court which awarded the issue. The object of the feigned issue being to satisfy the conscience of the court, a chancellor will sometimes award a new trial in cases in which a court of law could not interfere and will sometimes deny it, though improper evidence has been received. In *Lord Faulconberg v. Pierce*, Ambler, 210, Lord Hardwicke granted a new trial on the certificate of the judge that the verdict was against the weight of evidence—a cause for which a court of law would not grant a new trial. And in *Cleve v. Gasevique*, Ambler, 838, his lordship granted a new trial for the misdirection of the judge. In *Bowker v. Nixon*, 6 Taunt. 444, an application was made in the common pleas for a new trial of an issue ordered out of chancery on the ground of the im-

proper rejection of evidence by the judge who presided at the trial. It was insisted that for an error of the judge a motion should be made in the court of law, though it was conceded that for an error of the jury it might be made in the court which awarded the issue. But the court disregarded the distinction. . . . Although there may have been improper decisions by the judge, still, if on the whole it appears that justice has been done, the court will not interfere. *Pemberton v. Pemberton*, 11 Ves. Jr. 51, 52, 53. In this State the modern practice has leaned towards leaving the motion for a new trial to be made to the court which awarded the issue. Thus, in *Doe v. Doe*, 2 Cowen, 216, it was held that a motion for a new trial of a feigned issue to try the question of adultery should be made in the court of chancery. This case was partly decided on the phraseology of the statute (2 R. L. of 1818, pp. 197, 198, § 2), and which is retained in the Revised Statutes (2 R. S. 145, § 40). . . . This subject was well examined by McCoun, V. C., in *Mulock v. Mulock*, 1 Edw. Ch. 14, 18. The learned vice-chancellor observed that it was well understood that the rules which govern courts of law in granting new trials upon the ground of testimony improperly admitted or rejected have not been adopted by the court of chancery. Even courts of law have latterly undertaken to judge for themselves of the materiality of the evidence found to have been improperly admitted or rejected,

<sup>1</sup> *Fanning v. Russell*, 94 Ill. 896; *Van Alst v. Hunter*, 5 Johns. Ch. 158. In *Legard v. Daly*, 1 Ves. 192, an ap-

plication made five years and a half after the trial was denied.

<sup>2</sup> *Attorney-General v. Montgomery*, 2 Atk. 378.

of chancery it was allowed at the hearing upon the equity reserved.<sup>1</sup>

§ 669. The same subject continued.— After a verdict has been rendered the question of a new trial rests entirely in discretion,<sup>2</sup> so much so that an appeal will not lie from a decision of the court on such a motion.<sup>3</sup> If the judge certifies that he is dissatisfied with the verdict, the court does not as of course grant a new trial, although it is the ordinary practice

and when they have been satisfied that no injustice has been done, and the verdict would have been the same with or without such evidence, they have refused to grant a new trial. Lord Teynham v. Tyler, 6 Bing. 561. The object of a feigned issue is to satisfy the conscience of the court upon the matters of fact; and the object is attained when the conscience of the judge is satisfied that at the trial justice has been substantially done. In *Barker v. Ray*, 2 Russ. 68, Lord Eldon says this court, in granting or refusing new trials, proceeds upon very different principles from those of a court of law; and that it has been ruled over and over again that if on the trial of an issue a judge reject evidence which ought to have been received, or receive evidence which ought to have been rejected, although in that case a court of law would grant a new trial, yet if the court is satisfied the verdict ought not to have been different it will not grant a new trial upon such grounds. In *Booth v. Blundell*, 19 Ves. 508, and *Thompson v. Hanson*, 1 Ves. & B. 41, the same principles are recognized. Chancellor Walworth adopted the same doctrine in *Apthorp v. Comstock*, 2 Paige, 482. . . . See, also, *Head v. Head*, 1 Sim. & Stu. 150; s. c., *Turn. & Rua*, 142, to the like effect."

<sup>1</sup> *Apthorp v. Comstock*, 2 Paige, 485,

*Van Alst v. Hunter*, 5 Johns. Ch. 153. Notwithstanding the provision of the Colorado code that a motion for a new trial shall be interposed if the verdict is deemed against evidence, a motion for a decree in conflict with the verdict is a sufficient compliance. *Hall v. Linn*, 8 Col. 264.

<sup>2</sup> *Black v. Lamb*, 12 N. J. Eq. 106; *Dexter v. Codman*, 148 Mass. 421, where the court said:—"How far the fact that a jury has gone astray in dealing with one issue should be deemed important in considering a motion to set aside their finding upon another must depend upon the relations of these issues to each other in the particular case, the evidence introduced upon each, and any facts and circumstances which throw light upon the nature or probable cause of the jury's mistake. And finally, each issue has to be dealt with by itself, in view of the evidence, and of all that has occurred in the course of the proceedings." *Van Alst v. Hunter*, 5 Johns. Ch. 148, where the rule of a court of equity in granting new trials on feigned issues will be found fully considered. Chancery will often grant a second, and sometimes a third, fourth, or even a fifth, trial of a feigned issue, in cases where a court of law would not disturb the first verdict. *Patterson v. Ackerson*, 1 Edw. Ch. 96.

<sup>3</sup> *Black v. Lamb*, 12 N. J. Eq. 106.

to do so.<sup>1</sup> Conversely the court, as a general rule, will not set aside a verdict where the judge certifies that he is satisfied with the verdict, and that it ought to be regarded as conclusive on the questions submitted to the jury.<sup>2</sup> "The court ought not to listen to mere technical objections, and may very properly, and often does, refuse a new trial upon grounds which would prevail as a matter of course in a court of law."<sup>3</sup> The court may grant a new trial not only in cases where the verdict is against evidence, but it will nicely balance the evidence on both sides.<sup>4</sup> So a new trial may be granted on the ground of surprise<sup>5</sup> or fraud,<sup>6</sup> and for newly-discovered evidence, but in the latter case only in conjunction with fraud or surprise upon the party applying,<sup>7</sup> and on account of the absence of a material witness where his evidence is not merely corroborative,<sup>8</sup> and for a misdirection of the jury,<sup>9</sup> unless upon the whole evidence the court is satisfied that the verdict is right.<sup>10</sup> Though it is the most usual course to award a second trial on a feigned issue in cases touching the inheritance, where the verdict is in favor of the will and against the heir at law, yet it rests entirely in the discretion of the court to award a second trial or not according to the circumstances and testimony in the case.<sup>11</sup>

<sup>1</sup> *Falconberg v. Pierce*, Ambler, 210; *Atkyns v. Drake*, 1 M'Clel. & Y. 229.

<sup>2</sup> *Prudden v. Lindsley*, 81 N. J. Eq. 436.

<sup>3</sup> *Black v. Lamb*, 12 N. J. Eq. 108, 114. Upon a motion for a new trial it cannot be objected that the issue formed is not broad enough, and that other inquiries ought to have been involved in it, nor that the issue was tried by the justice before whom the jury was struck, if the trial was allowed to proceed without objection. *Bassett v. Johnson*, 2 N. J. Eq. 155.

<sup>4</sup> *Lansing v. Russell*, 8 Barb. Ch. 325; 2 Daniell's Ch. Pr. (1st ed.) 748.

<sup>5</sup> *Exton v. Turner*, 2 Ch. Cas. 80. See, also, *Willis v. Farrar*, 8 Y. & J. 264.

<sup>6</sup> 2 Daniell's Ch. Pr. (1st ed.) 750. See *Richards v. Symes*, 2 Atk. 819.

<sup>7</sup> 2 Daniell's Ch. Pr. (1st ed.) 750; *Standen v. Edwards*, 1 Ves. Jr. 183; *Legard v. Daly*, 1 Ves. 192; *Kemp v. Mackrell*, 2 Ves. 580.

<sup>8</sup> *Cleeve v. Gascoigne*, 1 Amb. 323. <sup>9</sup> *Cleeve v. Gascoigne*, 1 Amb. 323; *Bearblock v. Tyler*, Jac. 571. See, also, *O'Conner v. Cook*, 8 Ves. 536; *Tatham v. Wright*, 2 R. & M. 31; *Ringrose v. Todd*, 12 Price, 650; *Barker v. Ray*, 2 Russ. 68.

<sup>10</sup> *Trenton Banking Co. v. Russell*, 2 N. J. Eq. 511; *Meek v. Spracher* (Va.), 12 S. E. Rep. 397; *Snouffer v. Hansbrough*, 79 Va. 166.

<sup>11</sup> *Van Alst v. Hunter*, 5 Johns. Ch. 148. "If the verdict, coupled with the information of the judge's notes, does not afford satisfaction, a new trial will be directed, although there be no surprise or fraud, nor manifest

§ 670. *Proceedings after trial.*—After the cause has been tried and the record completed by the addition of the *postea*, the cause, unless a new trial is moved for and granted, must be brought to a hearing in the usual way.<sup>1</sup> By the English practice this could not be done until after the first four days of the term next after the trial had elapsed, in order that the party against whom the verdict was found might have an opportunity to move for a new trial.<sup>2</sup> The cause then comes on in the regular course, when such final or other decree as the case calls for will be pronounced.<sup>3</sup> The fact that an issue has

misarranged, and the verdict be one which at common law would be undisturbed. *Boote v. Blundell*, 19 Ves. 500; *Northam Bridge Co. v. Southampton Ry. Co.*, 11 Sim. 42; *East India Co. v. Bazett*, Jac. 81. And even though no new trial is sought, yet when the cause is brought on for further directions, the court, if it thinks that the issue as tried does not answer the purpose intended, may direct a new one to be framed, or may, on reconsideration of the evidence, decide at once against the verdict. *Armstrong v. Armstrong*, 8 M. & K. 45. *Adams' Equity* (7th Am. ed.), 377. The court refused to set aside the verdict of the jury finding fraud, upon an affidavit by a juror qualifying its meaning, where the fraud was evident by the statement in the defendant's answer. *Doss v. Tyack*, 14 How. (1852), 298.

<sup>1</sup> *Allen v. Blunt*, 3 Story, 742; 2 *Daniell's Ch. Pr.* (5th ed.) 1146. "The action must be brought to a hearing before the court and the court's decision must be made in writing in the same manner as if there had been no verdict of the jury on the issues." *MacNaughton v. Osgood*, 114 N. Y. 574, 577. After an issue ordered the court may proceed to a final decree without trying the issue or setting aside the order. *Field v. Holland*, 6 Cranch, 8. After the trial

of an issue the plaintiff cannot move to dismiss his bill with costs, although he might have done it before the trial actually took place. *Carrington v. Holly*, 1 Dick. 281. See §§ 450, 461, 462, *supra*.

<sup>2</sup> 1 *Barbour's Ch. Pr.* (2d ed.) 461; 1 *Newland's Ch. Pr.* 357.

<sup>3</sup> 2 *Daniell's Ch. Pr.* (1st ed.) 758. If the verdict on an issue framed in chancery is not warranted by the proofs upon all the points which should have been decided in the issue, then the parties should be permitted to bring in their evidence on the points not so settled, the verdict standing as conclusive upon the other points, or the verdict should be set aside and all points be thrown open to controversy. But, if the verdict be vacated, then the cause is not ripe for decision upon disputed questions of fact, for the cause cannot be finally decided upon the proofs offered at the jury trial. Ordinarily such evidence is before the chancellor only for determining what weight should be given to the verdict. *Prudden v. Lindsley*, 29 N. J. Eq. 615, 618. Where the jury impaneled to try an issue fails to agree, the court may refuse to call another jury and may decide the case on the evidence heard before the issue was framed. *Keithley v. Keithley*, 85 Mo. 217. Where the findings of a jury adopted by the

been awarded and the verdict of a jury rendered in the cause upon which the decree of the chancellor is based does not take away or limit the control of the appellate court over the decree.<sup>1</sup>

§ 671. **Distinction between an issue and an action.**—“The distinction between the suspension of proceedings in an equity suit with leave to a party to bring a suit at law, or directing an action, and an issue out of chancery, is well settled. If the cause is allowed to stand over with leave to bring an action, or directing an action at law, the action is prosecuted in compliance with the practice and proceedings in ordinary actions at law, bills of exceptions may be taken at the trial, and the proceedings are reviewable by rule to show cause and writ of error in the usual manner, and judgment at law may be entered, which will be accepted in the equity court as a finality. But where an issue is sent out of chancery the whole proceeding is under the control of the chancellor. No bill of exceptions can be taken, no judgment entered, the circuit record and *postea* are sent to the court of chancery, and the conduct and result of the trial are subject to review in that court only.”<sup>2</sup>

court are not responsive to all the issues made material, the court must make further findings, unless such further findings are waived. *Waring v. Freear*, 64 Cal. 54. The fact that in an equity case the jury are allowed to return a general verdict is harmless error, where they also re-

turn special findings for the same party, which are accepted by the court, and on which judgment is rendered. *McCauley v. McKeig*, 8 Mont. 389; s. c., 21 Pac. Rep. 23.

<sup>1</sup> *Freeman v. Staats*, 9 N. J. Eq. 816.

<sup>2</sup> *American Dock Co. v. Trustees &c.* (1888), 37 N. J. Eq. 266, 269.

## CHAPTER XXI.

### REFERENCE TO A MASTER.

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| <p>§ 672. Reference to a master generally.</p> <p>673. Reference of the whole case.</p> <p>674. Propriety of a preliminary decree.</p> <p>675. Reference of a plea.</p> <p>676. Appointment of a master.</p> <p>677. The same subject continued.</p> <p>678. Compensation of masters.</p> <p>679. Payment of master's fees.</p> <p>680. Reference to state an account.</p> <p>681. The same subject continued —<br/>Infringement suits.</p> <p>682. Reference on creditors' bills.</p> <p>683. Withdrawal of reference.</p> <p>684. Order of reference.</p> <p>685. Master's authority — Scope of reference.</p> <p>686. Bringing on a reference.</p> <p>687. Parties entitled to attend a reference.</p> <p>688. A state of facts.</p> <p>689. Evidence before a master.</p> <p>690. Examination of witnesses.</p> <p>691. Proceedings before a master.</p> <p>692. The same subject continued.</p> <p>693. Accounting before the master.</p> <p>694. Master's report.</p> | <p>§ 695. Draft report and objections thereto.</p> <p>696. Master's report on accounts.</p> <p>697. Report of testimony.</p> <p>698. Amendment of report.</p> <p>699. Confirmation of report.</p> <p>700. Province of exceptions.</p> <p>701. The same subject continued.</p> <p>702. Objections for irregularities.</p> <p>703. Waiver of irregularities.</p> <p>704. Objections preliminary to exceptions.</p> <p>705. Form of exceptions.</p> <p>706. The same subject continued.</p> <p>707. Time for filing exceptions.</p> <p>708. Extension of time.</p> <p>709. The same subject continued.</p> <p>710. Argument of exceptions.</p> <p>711. Weight of the master's findings.</p> <p>712. Correction of report by the court.</p> <p>713. Re-reference.</p> <p>714. Reference discretionary.</p> <p>715. Scope of re-reference — Authority of master.</p> <p>716. Costs of exceptions.</p> |
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§ 672. Reference to a master generally.—“A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar serv-

ices."<sup>1</sup> A reference may be made to a master to ascertain the facts upon a petition for leave to sue a receiver.<sup>2</sup> Upon a bill for specific performance of a contract for a deed with "usual covenants," it may be referred to a master to inquire

<sup>1</sup> Per Field, J., in *Kimberly v. Arms*, 129 U. S. 512, 523. "The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence. [See § 711, *infra*.] In practice it is not unusual for the court to reject the report of a master with his findings upon the matter referred to him, unless exceptions are taken to them and brought to its attention, and upon examination the findings are found unsupported or defective in some essential particulars." *Kimberly v. Arms*, *supra*. See § 700, *infra*. No order of reference can be made to ascertain any facts taking place after the final decree. *Pearson v. Carr*, 97 N. C. 194; *White v. Butcher*, 97 N. C. 7. A matter put in issue by the pleading must be determined by the court and cannot be referred to a master unless, for the disability of the chancellor, the whole cause is so referred, and then the master determines it, sitting as and for the chancellor. *Morris v. Taylor* (1872), 28 N. J. Eq. 184; *Lumsford v. Boston*, 1 Dev. (N. C.) Eq. 487. Where the facts on which the rights of the parties on a particular point depend appear on the face of the pleadings, and are undisputed, the question is for the court, and no report of the master is necessary. *Clark v. Hershey*, 52 Ark. 473; s. c., 12 S. W. Rep. 1077. The

powers and duties of auditors in Maryland are analogous to those of a master in chancery, and are fully stated and defined by Chancellor Bland, in *Dorsey v. Hammond*, 1 Bland, 463, 467, and *Townshend v. Duncan*, 2 Bland, 45, 74. See, also, *Trustees &c. v. Heise*, 44 Md. 453, 465. Under the existing practice in South Carolina, the judge in an equity cause has the same power as he formerly had to have the testimony taken and reported to him by a referee. *McSween v. McCown*, 21 S. C. 371, 374; *McCrary v. Jones* (S. C.), 15 S. E. Rep. 480. The New York Code of Civil Procedure, section 1013, providing for compulsory references in actions at law or in equity where the trial will require the examination of a long account on either side, and will not require the decision of difficult questions of law, does not authorize a reference for the purpose of taking testimony, but only to try or determine and find some fact involved in the issue; nor does it authorize a reference where a long account is collaterally, and not directly, involved. Neither that clause of section 1015 of the Code authorizing a reference "to take an account and report to the court thereon, either with or without the testimony," nor that authorizing a reference in an equity case to determine and report upon a question of fact arising at any stage of the action, upon a motion or otherwise, "except upon the pleadings," give the court power, in a suit in equity to enjoin the operation of an elevated

<sup>2</sup> *Farmers' L. & T. Co. v. Central Railroad*, 1 McCrary, 382.



what are "usual covenants."<sup>1</sup> When the question arises on a bill for partition as to the undivided rights and interests of the parties, the usual course is to direct a reference to a master to inquire and report.<sup>2</sup> Exceptions for scandal, impertinence or insufficiency in pleadings may also be referred to a master.<sup>3</sup>

§ 673. *Reference of the whole case.*—It is not competent for a court of chancery, of its own motion or upon the request of one party, to abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its officers.<sup>4</sup> But it has always been within the power of the court, with the consent of all parties, to refer to a master the entire decision of a case upon all the issues, both of fact and of law,<sup>5</sup> and such references have become in late years a matter of more common occurrence than formerly.<sup>6</sup> Under the circumstances stated and when the consent reference has been entered as a rule of the court, "the master is clothed with very different powers from those which he exercises upon ordinary references without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court."<sup>7</sup> His findings, "like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the res-

railroad in the street, and to recover damages, as to which an issue is raised, to refer the cause to a referee to take testimony as to the damages sustained, and to report the same to the court with his opinion thereon. *Doyle v. Metropolitan El. Ry. Co.* (N. Y. App.) 82 N. E. Rep. 1008; affirming s. c., 20 N. Y. Supl. 865, and distinguishing *Camp v. Ingersoll*, 86 N. Y. 488; *Drexel v. Pease*, 129 N. Y. 96.

<sup>1</sup> *Wilson v. Wood*, 17 N. J. Eq. 216.

<sup>2</sup> *Phelps v. Green*, 3 Johns. Ch. 302.

<sup>3</sup> *Adams' Equity* (7th Am. ed.), 880. See §§ 111, 417, *supra*.

<sup>4</sup> *Kimberly v. Arms*, 129 U. S. 512, 524.

<sup>5</sup> *Kimberly v. Arms*, 129 U. S. 512, 524. Where no exception was taken

to an order of reference to a master to take and state an account, and no exception was taken before the master, and all the evidence was presented that was desired by either party, and full justice in this respect was attained, the objection that the master virtually decided the case instead of the court is not well grounded. *Memphis v. Brown*, 20 Wall. 289.

<sup>6</sup> *Kimberly v. Arms*, 129 U. S. 512, 524. The power is incident to all courts of superior jurisdiction. *Newcomb v. Wood*, 97 U. S. 581, 588.

<sup>7</sup> *Per Field, J.*, in *Kimberly v. Arms*, 129 U. S. 512, 524. See *Oteri v. Scalzo*, 145 U. S. 578; s. c., 12 S. Ct. Rep. 895.

ervation contained in the consent and order of the court when there has been manifest error in the consideration given to the evidence or in the application of the law, but not otherwise."<sup>1</sup>

**§ 674. Propriety of a preliminary decree.**—The aid of a master is invoked usually for the investigation of details of facts and to make orderly statements and summaries. The better practice is for the chancellor first to hear the case upon the pleadings and such evidence as may enable him to determine the principles to be applied in adjusting the equities of the parties, and then to make a reference for such special inquiries or statements of accounts as may aid him in making a definite decree.<sup>2</sup> But a reference before any decree upon the

<sup>1</sup> Per Field, J., in *Kimberly v. Arms*, 129 U. S. 512, 524, citing *Haggett v. Welsh*, 1 Sim. 134; *Dowse v. Coxe*, 8 Bing. 20; *Prior v. Hembrow*, 4 M. & W. 373.

<sup>2</sup> *Franklin v. Meyer*, 36 Ark. 96, 109; *Hicks v. Hogan*, 36 Ark. 298, 302, where the court said:—"The line between the matters which the chancellor may determine in the first instance and those which for convenience and dispatch of business are more properly referable to a master cannot be drawn with precision; but it may serve as a guide to say that all matters of law should as far as possible be first determined by the court and fixed by the decree, leaving for the master only the investigation of such matters of fact as may be necessary to him in making a report or statement of accounts in accordance with directions in the decree." "There ought never to be any decree of reference without a preliminary adjudication." Per Chancellor Cooper, in *Jones v. Douglass*, 1 Tenn. Ch. 357, 360. Especially in cases involving the sale of the realty of infants. It was held in *Wessells v. Wessells*, 1 Tenn. Ch. 58, that the court has no power to order a reference to take

an account before a hearing of the cause on its merits, except by consent of the parties, and even then the practice is reprobated. The chancellor must first be satisfied that the complainant is entitled to have an account taken. *Campbell v. Campbell's Adm'r.* 8 N. J. Eq. 738, 748. The cases where it would be proper to order a reference before any interlocutory decree are exceptions. *Franklin v. Meyer*, 36 Ark. 96, 109. Admissions in the pleadings may dispense with the necessity for such a decree. *Burns v. Rosenstein*, 135 U. S. 449. See, also, *Scott v. Pinkerton*, 3 Edw. Ch. 70. *Field v. Holland*, 6 Cranch, 8, 25, holds that it is not reversible error to pursue either course. In *Hudson v. Trenton & C. Mfg. Co.*, 16 N. J. Eq. 476, the practice was thus laid down:—"As a general rule the court will not, at the original hearing, examine or decide whether particular items of the account shall or shall not be allowed. The court must, it would seem, settle the construction and effect of agreements between the parties, by which their mutual dealings were regulated, and by which, consequently, the account must be controlled. The court

rights of the parties, if made by consent, is not erroneous.<sup>1</sup> On the foreclosure of a mortgage, where the question is only as to the amount due, it is the established practice in Vermont to refer the matter to a master in the first instance, and the subject is not to be litigated by answer, replication and proofs, as in ordinary equity cases, but the action of the court is had upon what is brought before it by the master's report.<sup>2</sup>

**§ 675. Reference of a plea.**—Where a plea sets up matters of fact the truth of which may be immediately ascertained by mere inquiry, it is usually referred to one of the masters of the court to make the inquiry.<sup>3</sup> Such a reference may be made to ascertain the truth of a plea of another suit pending, or the truth of a plea setting up a former judgment or decree in bar of the suit.<sup>4</sup> The questions of the identity of the parties and of the identity of the causes of action may also be included in the reference,<sup>5</sup> unless the circumstances are such as to require a protracted litigation as to whether or not the same evidence could have been offered in the two suits, or in relation to other matters averred as inferences from the records, which ought to be conducted in the ordinary course of proceeding, upon issue joined by the taking of proofs before

will give special directions to the master as to the manner of taking the account, and the principles by which he should be governed in taking it. The decree must direct to what matters the account shall extend; and in decreeing a general account, special directions will be rendered proper and necessary by the particular circumstances of the case. Where the evidence has been taken on both sides before the hearing without objection, it may be used by the court, so far as may be necessary, in giving directions. Upon a suit for infringement of a patent, if infringement is admitted by the pleadings damage is presumed and the complainant is entitled to a reference for accounting without giving

specific evidence of damage. *Campbell & Co. Mfg. Co. v. Manhattan Ry. Co.*, 49 Fed. Rep. 980; *Brickill v. Mayor*, 7 Fed. Rep. 479.

<sup>1</sup> *Hicks v. Hogan*, 36 Ark. 298, 302.

<sup>2</sup> *Hathaway v. Hagan* (Vt.), 24 Atl. Rep. 181; *Warner v. Quinlon*, 50 Vt. 652.

<sup>3</sup> *Mitt. Eq. Pl.* 304; *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 17 Blatchf. 389.

<sup>4</sup> *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 17 Blatchf. 389; *Morgan v. Morgan*, 1 Atk. 58, holding, however, that the court will determine the facts if the plaintiff does not apply for a reference.

<sup>5</sup> *Tarleton v. Barnes*, 2 Keen, 685; *Wild v. Hobson*, 2 Ves. & B. 110.

an examiner, to be submitted to the court upon the hearing of the cause.<sup>1</sup>

§ 676. Appointment of a master.— A master may be appointed by order of court on motion.<sup>2</sup> The United States “circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case.”<sup>3</sup> Under the South Carolina statute which authorizes the presiding judge, “in case of the disability of the master, from interest or any other reason,” to appoint a special master, it is the province of the presiding judge to decide upon the disability of the master, and to appoint a special master, and the Supreme Court will not interfere, except where he has abused his discretion.<sup>4</sup> And such an appointment may be made where the master was formerly the judge, the validity of whose order is at issue.<sup>5</sup>

§ 677. The same subject continued.— The federal statutes provide that “no clerk of the district or circuit courts of the United States shall be appointed a receiver or master in any case, except where a judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment;”<sup>6</sup> and that “no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge, to be employed by such court or judge in any office or duty in any court of which such justice or judge may be a member.”<sup>7</sup> A solicitor, or the partner of a solicitor, in a cause cannot properly perform any

<sup>1</sup> *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 17 Blatchf. 389.

<sup>2</sup> *Phillips' Appeal*, 68 Pa. St. 187. The duty imposed on a person appointed by order of a court “commissioner to hear the parties, and to report facts and such of the evidence as either party may desire,” is that of a master in chancery. *Dean v. Emerson*, 102 Mass. 480.

<sup>3</sup> United States Equity Rule 82.

<sup>4</sup> *Verner v. Davis*, 26 S. C. 609; s. c., 2 S. E. Rep. 114.

<sup>5</sup> *Roberts v. Johns*, 24 S. C. 580.

<sup>6</sup> 20 U. S. St. at L., ch. 183, p. 415. The consent of the parties is a sufficient “special reason,” and the proper recital may be inserted in an order by amendment. *Fischer v. Hayes*, 22 Fed. Rep. 92.

<sup>7</sup> 24 U. S. St. at L., ch. 373, § 7, p. 552.

official act as a master therein.<sup>1</sup> One who is a creditor and a party is incompetent to take and report an account in a general creditor's suit.<sup>2</sup>

**§ 678. Compensation of masters.**—A federal equity rule provides that “the compensation to be allowed to every master in chancery, for his services in any particular case, shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof;<sup>3</sup> and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct.<sup>4</sup> The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if upon notice thereof he does not pay it within the time prescribed by the court.”<sup>5</sup>

**§ 679. Payment of master's fees.**—A master's fees on adjournment of a hearing should be paid by the party asking the adjournment, and it is the better practice to pay such fee when the adjournment is had.<sup>6</sup> On a hearing before a master each party should pay in the first instance the costs, charges, expenses, stenographer's fees and master's fees for taking its own direct, redirect, cross or recross-examination of any wit-

<sup>1</sup> *Brown v. Byrne*, Walk. Ch. 403; *Bowers' Adm'r v. Bowers*, 29 Gratt. 697.

<sup>2</sup> *Dillard v. Krise*, 86 Va. 410; s. c., 10 S. E. Rep. 430. The fact that a master in chancery employs one of the parties to a suit as his amanuensis does not invalidate the master's report, where no improper conduct on the part of the amanuensis is shown or claimed. *Longmire v. Fain*, 89 Tenn. 393; s. c., 18 S. W. Rep. 70.

<sup>3</sup> *Erie Ry. Co. v. Heath*, 10 Blatchf. 214. The amount may be measured by the standard of judicial salaries. *Middleton v. Bankers' & Merchants' Tel. Co.*, 32 Fed. Rep. 524. See *Schmidt v. Miller* (Ky.), 16 S. W. Rep. 85; *Woodruff v. Straw*, 4 Paige, 407.

<sup>4</sup> Where a master, after filing his report, presented a petition to the court in which the suit was brought asking that plaintiffs therein be ordered to pay his fees, the amount whereof had been fixed by agreement of counsel, an action will not lie for the fees in the absence of evidence that the petition had been disposed of. *Woodward v. Brace* (Pa.), 20 Atl. Rep. 1001.

<sup>5</sup> Equity Rule 82. See *Frese v. Biedenfeld*, 14 Blatchf. 402; *Myers v. Dunbar*, 12 Blatchf. 390; *Urner v. Kayton*, 17 Fed. Rep. 539; *Mallory Mfg. Co. v. Fox*, 20 Fed. Rep. 409.

<sup>6</sup> *Brickill v. Mayor & Co.*, 55 Fed. Rep. 565.

ness or witnesses; but on final decree, the sum so paid by the prevailing party may be imposed on the defeated party.<sup>1</sup>

**§ 680. Reference to state an account.**—If the chancellor be satisfied that the complainant is entitled to an account, the practice is to refer it to a master to state the details of the account and ascertain the balance.<sup>2</sup> The chancellor may, if he see fit, take the account himself;<sup>3</sup> but the practice is condemned,<sup>4</sup> and has been pronounced erroneous by the appellate courts where the accounts are complex and intricate, or involve large sums and depend upon conflicting testimony.<sup>5</sup>

<sup>1</sup> *Brickill v. Mayor &c.*, 55 Fed. Rep. 565, 566. "As to apportioning master's fees:—When a session is taken up entirely with taking testimony, the expenses of taking which one side is to bear, the master's fees for that session are to be paid by that side. If, however, the session is taken up partly with taking testimony which one side is to pay for, and partly with taking testimony which the other side is to pay for, the master's fee for that session is properly chargeable, in equal shares, to both, irrespective of the proportionate amount of time consumed by both. Sessions consumed in whole or in part by argument may be settled for in the same way. Time consumed in consideration and decision of the questions involved and in preparing the report is chargeable in equal shares to both parties." Per Lacombe, C. J., in *Brickill v. Mayor &c.*, *supra*.

<sup>2</sup> *Campbell v. Campbell's Adm'r.*, 8 N. J. Eq. 733, 743; *Bryan v. Morgan*, 35 Ark. 113. If in an action for an account the court is satisfied nothing is due to the complainant from the defendant, no further proceedings will be permitted, but the bill will be dismissed. *Stout v. Seabrook's Executors*, 80 N. J. Eq. 187.

<sup>3</sup> *Bryan v. Morgan*, 35 Ark. 113;

*Emery v. Mason*, 75 Cal. 232; s. c., 16 Pac. Rep. 894; *Campbell v. Campbell*, 8 N. J. Eq. 733, 743; *May v. May*, 19 Fla. 373.

<sup>4</sup> *Bryan v. Morgan*, 35 Ark. 113. "If, when the parties request a circuit judge to dispose of a case of accounting (without a reference), it were certain that they would accept and abide by his conclusions, there might be no objections to that course. But as such a case is always open to an appeal, and cases of accounting are very likely to involve much personal feeling which leads to persistency in litigation, it is a mistake when the circuit judge yields to the wishes of parties and undertakes to settle a case of accounting otherwise than in the usual way." Per Cooley, J., in *Barnebee v. Beckley*, 43 Mich. 613.

<sup>5</sup> *St. Colombe v. United States*, 7 Pet. 625, where a decree practically dismissing a bill after examination of such an account by the court was reversed with instructions to refer the account; *French v. Gibbs*, 106 Ill. 523, where it was said that "It is a labor that counsel will not be permitted by stipulation or otherwise to impose on an appellate court;" *Beale v. Beale*, 116 Ill. 292; *Moses v. McCall*, 75 Ill. 190; *Steere v. Hoagland*, 89 Ill. 264; *Bressler v. McCune*,

**§ 681. The same subject continued — Infringement suits.** The practice in the United States circuit court for the first circuit upon references to a master to ascertain the damages in suits for the infringement of a patent was thus declared by Justice Clifford:— “The usual course is that the master allow both parties, if they desire, to introduce evidence upon the subject of damages. He hears them fully, and when he has taken all the testimony, heard the parties and come to a conclusion he makes a draft of his report in the premises and shows it to the parties or files it in the clerk’s office and gives time for the parties respectively, if they see fit, to make their objections to the drafted report. When those objections are made it becomes his duty to consider or to reconsider, as the case may be, the questions involved in those objections; and if, upon full consideration, he is still of the opinion that he was right in the conclusions formed and stated in the drafted report, he then makes his final report, and the parties have a right to file exceptions to the final report founded upon the previous objections made to the draft report, and then the whole matter comes back to the circuit court for adjudication upon the master’s report. Either party may set down the case for hearing upon the exceptions to the master’s report; both parties may except; both may object in the first instance to the draft report and both parties may afterwards except to the final report. They are entitled to be heard upon the questions which have arisen before the master, provided they are embraced in their objections and in their exceptions. When the exceptions are filed, if either of the parties desire the evidence to be reported they request the master to report it in whole or in part, as the case may be. It is the usual course for the master to comply with such request, but if

56 Ill. 475; *Riner v. Touslee*, 62 Ill. 266; *Groch v. Stenger*, 65 Ill. 481. But in *Whittemore v. Fisher*, 132 Ill. 243; s. c., 24 N. E. Rep. 686, it was held that the objection that an account should have been referred to a master instead of being stated by the court cannot be raised for the first time on appeal. Where a bill prays for an accounting, and also for other relief, and the complainant on the hearing abandons all claim for an accounting, the defendant, not having filed a cross-bill, cannot assign error because the court did not refer the cause to a master to take and report an account. *Schulz v. Schulz*, 138 Ill. 665; s. c., 30 N. E. Rep. 817; affirming s. c., 28 N. E. Rep. 808.

neither party makes the request it is not incumbent upon the master to report the evidence at all. He may or may not, in his discretion, as he sees fit. If he does report the evidence at the request of one or both parties it then becomes the duty of the court, if there be proper exceptions, to review the questions of fact embraced in the report as well as the questions of law."<sup>1</sup>

**§ 682. Reference on creditor's bills.**—In a creditor's bill filed on behalf of the complainant and of all other creditors that choose to come in and share the expenses, for the purpose of securing due administration and application of a trust fund, it is the usual and correct course to open a reference in the master's office and to give other creditors, having valid claims against the fund, an opportunity to come in and have the benefit of the decree.<sup>2</sup> A creditor, upon a proper case being shown by petition, may be permitted to come in and prove his debt under a decree at any time while the fund or any part thereof is under the control of the court, notwithstanding the time limited by the master for the creditors to come in and prove their debts has expired.<sup>3</sup>

**§ 683. Withdrawal of reference.**—After a cause has been referred to a master it cannot be withdrawn from that master without an order of the court; and such an order will not be made unless on very special occasions, such as the incapacity of the master from illness to attend to the business, which,

<sup>1</sup> Per Justice Clifford, in *Union Sugar Refinery v. Mathiesson*, 3 Cliff. 146, 148.

<sup>2</sup> *Johnson v. Waters*, 111 U. S. 640; *Hackensack Water Co. v. DeKay*, 86 N. J. Eq. 548; *Hazen v. Durling*, 2 N. J. Eq. 134. But it is merely a matter of form whether the new parties shall come in as co-complainants or before the master under the decree. *Stewart v. Dunham*, 115 U. S. 61. See §§ 576, 577, *supra*.

<sup>3</sup> *Brooks v. Gibbons*, 4 Paige, 374. After the filing of the master's report, a creditor who has neglected to come in in time cannot have an *ex*

*parte* order permitting him to go before the master and prove his debt, but he must give notice of his application to the solicitors of the creditors who have already proved their claims and to the original parties in the suit. *Wilder v. Keeler*, 8 Paige, 164. Where creditors apply for payment of their debts out of a fund and children are interested in it, a guardian *ad litem* may be appointed for them to appear before the master to scrutinize the creditor's claims and protect their rights. *In re Howe*, 2 Edw. Ch. 484.



to justify such removal, must be shown to be of a very urgent nature.<sup>1</sup> A master cannot be summarily dismissed by the court and a new master appointed on an *ex parte* hearing of a petition by one party in interest.<sup>2</sup>

§ 684. Order of reference.—An order of reference for account before a master cannot be more extensive than the allegations and proofs of the parties.<sup>3</sup> The general language of an order must be construed in connection with the pleadings, and therefore a requirement that the master report debts due from certain persons for land in controversy, “or from any other person,” will embrace only such persons as are parties to the suit.<sup>4</sup>

<sup>1</sup> Daniell's Ch. Pr. (5th ed.) 1168; Anon., 9 Ves. 341; Gibbon's Appeal, 104 Pa. St. 587.

<sup>2</sup> Gibbon's Appeal, 104 Pa. St. 587, where it was said that “such special applications concerning the proceedings in the cause not regulated either by general order or by any clearly defined rule of practice must always be made upon notice,” citing Daniell's Ch. Pr. 1790. See, also, Bishop v. Williams, Walk. Ch. 423; Forrest v. Forrest, 8 Bosw. 650; Clark v. Clark, 7 Rob. 157; Billings v. Vanderbrek, 15 How. Pr. 295; White v. Smith, 1 Lans. 469.

<sup>3</sup> Perdue v. Brooks (Ala.), 11 So. Rep. 282; Consequa v. Fanning, 8 Johns. Ch. 587, holding that where the charges in a bill for account are specific, setting forth the items of the accounts with their dates, on an order of reference for an account, the inquiry is not open beyond the special matters charged, although the bill may contain a general charge at the conclusion and a prayer “for a full account concerning the premises.” Upon motion for reference to a master it is too late for the defendant to insist that the charges in the bill are not sufficiently specific. Chicago &c. St. Ry. Co. v. Pullman

Palace Car Co., 50 Fed. Rep. 24. “Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding and disposed of, unless the court shall otherwise direct.” United States Equity Rule 78.

<sup>4</sup> Murrell v. Watson, 1 Tenn. Ch. 342. A reference to a master was made by consent of complainant and the answering defendants, and the order of reference directed that notice of the reference be given to all the defendants in the suit. It was held that the order did not give leave to a defendant against whom there was a decree *pro confesso* to come in before the master and set up, under the reference, a claim which ought to have been set up by answer. Kuhl v. Martin, 28 N. J. Eq. 370. In Perrin v. Lepper, 72 Mich. 454; s. c., 40 N. W. Rep. 859, upon a reference to take testimony to determine “the principles” for an accounting, the parties having adopted a liberal construction of the order, and brought before the court all the information obtainable relating to the

§ 685. **Master's authority — Scope of reference.**— The master's authority as to the subjects and extent of his examination and report is limited and controlled by the order of reference<sup>1</sup> and the issues made by the pleadings.<sup>2</sup> Where no special directions are given in the decree for an account, it is the plain duty of the master to follow the ordinary rules and not to consider equities existing back of the decree. Those are for the determination of the chancellor.<sup>3</sup> The master

accounts, it was held that a final decree would be rendered if the ends of justice were satisfied. If the order is ambiguous, it may be that the master has authority to report the case back for more specific instructions. Certainly the court, when the report comes in, may, in its discretion, correct the order and recommit the cause. *Union Sugar Refinery v. Mathiesson*, 3 Cliff. 146, 153.

<sup>1</sup> *Stonington Savings Bank v. Davis*, 15 N. J. Eq. 81; *Morris v. Taylor*, 28 N. J. Eq. 181; *Lonsdale Co. v. Moies*, 2 Cliff. 538; *Gordon v. Hobart*, 2 Story, 248; *Farmers' L. & T. Co. v. Central Railroad*, 2 Fed. Rep. 656. He cannot pass upon jurisdictional questions. *Smith v. Rock*, 59 Vt. 232. It is the duty of a master appointed to "hear the parties and their evidence, find the facts and report the same to the court," to report his conclusions of fact. *Parker v. Nickerson*, 137 Mass. 487; *Jones v. Keen*, 115 Mass. 171.

<sup>2</sup> *Potter v. Howe*, 141 Mass. 357; *Waterman v. Curtis*, 26 Conn. 241, 247; *Providence Rubber Co. v. Goodyear*, 9 Wall. 788; *Brainerd v. Arnold*, 27 Conn. 617. See, also, *Morris v. Mowatt*, 4 Paig., 142; *Kuhl v. Martin*, 28 N. J. Eq. 370; *Mackenzie v. Flannery* (Ga.), 16 S. E. Rep. 710. The question whether a mortgagee should, in a suit for foreclosure of the mortgage, account for rents and profits of the mortgaged premises must be raised in the pleadings. If

not so raised, the master, under an order of reference to take and state an account of the amount due upon the mortgage, ought not to entertain it. *Wycoff v. Combs*, 28 N. J. Eq. 40. On a bill to redeem land from a mortgage an interlocutory decree was entered that the plaintiff be allowed to redeem; that the defendant be allowed for the improvements made on the premises; and that the case be sent to a master to report the amount due on the mortgage and the value of improvements placed on the land after deducting rents and profits. It was held that the plaintiff was not precluded at the hearing before the master from showing that no improvements had been made on the land. *Merriam v. Goss*, 139 Mass. 77. See *McCormack v. James*, 36 Fed. Rep. 14; *Appeal of Tolles* (Pa.), 14 Atl. Rep. 394.

<sup>3</sup> *Izard v. Bodine*, 9 N. J. Eq. 309. The answer to a bill for an account set up an account stated and denied all the allegations not specifically admitted. The petitioners replied, re-affirming the averments of the bill and denying those of the answer, and especially denying that there had been an account stated. It was held that a committee to whom the case was referred was not bound to limit his inquiry to the question whether there was an account stated, but might properly proceed to inquire into and state the account. *Chatham v. Niles*, 36 Conn. 408.

cannot properly change the order of priority of incumbrances as given in a bill of foreclosure and established by a decree *pro confesso*.<sup>1</sup>

**§ 686. Bringing on a reference.**—The United States Equity Rules provide that the party at whose instance and for whose benefit the reference is made shall cause the matter to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.<sup>2</sup> “Upon every such reference it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors.”<sup>3</sup> The general rule that all persons having an interest are entitled to notice extends to cases in which a defendant, after appearance, has allowed the bill to be taken against him *pro confesso*, and a decree to be made for want of an answer.<sup>4</sup>

**§ 687. Parties entitled to attend a reference.**—The general rule is that all persons beneficially interested, whether

When the Supreme Court has decided that the plaintiff is entitled to a full accounting in respect to a given series of transactions upon definite principles of liability, the master's report is not subject to exception because it awards a sum exceeding the amount named in the bill, and it is immaterial whether the bill has been amended. *Nashua &c. Corp. v. Boston &c. Corp.*, 49 Fed. Rep. 774.

<sup>1</sup> *Mulford v. Williams*, 8 N. J. Eq. 586.

<sup>2</sup> Equity Rule 74.

<sup>3</sup> Equity Rule 75. Notice may be served by mail. *Kerosene Lamp Heater Co. v. Fisher*, 1 Fed. Rep. 91.

<sup>4</sup> *King v. Bryant*, 3 M. & C. 191; 2 Daniell's Ch. Pr. (5th ed.) 1175. As to the right to notice generally,

see *Wright v. Herlong*, 16 S. C. 620; *Hubbard v. Camperdown Mills* (S. C.), 1 S. E. Rep. 5. Parties are entitled to notice of the hearing before the master, although only records are to be examined. *Wardlaw v. Erskine*, 21 S. C. 359. The notice must be reasonable. *Bernie v. Vandever*, 16 Ark. 616. Under the old English practice a party was entitled to at least one clear day between the service of notice and the hearing. 1 Newland's Ch. Pr. 324. Three days' notice was held to be too short in *Moore v. Bruce*, 85 Va. 139; s. c., 7 S. E. Rep. 195, but no prejudice having resulted the decree was not disturbed. No notice of reference is necessary where there is no contest of the question referred. *Mosby v. Hunt*, 9 Heisk. 675, 677. See, also,

actual parties to the suit or such as have become *quasi*-parties by having come in and established a claim, are entitled to attend on a reference before a master whenever the object is such as may affect their interests, or increase or diminish their proportion in the fund.<sup>1</sup> Trustees are not allowed (except in proceedings carried on by themselves) to attend before the master in cases where all the *cestuis que trust* are before the court; but if there are any parties who are or may become interested, and whose interests are only represented by the trustees, and are not too remote, the trustees will be entitled to attend the proceedings affecting those interests.<sup>2</sup> An executor or administrator, as the legal representative of his testate or intestate, is entitled, as representing the creditors, to attend on all proceedings relating to the claims of creditors seeking payment out of the personal estate; but, after there has been a report of the debts, if all the parties interested in the personal estate are before the court, he is only entitled to attend on those proceedings in which he is personally interested as an accounting party.<sup>3</sup>

§ 688. A state of facts.—By the former English practice upon the prosecution of a reference it was necessary for the party to carry in a state of facts detailing the circumstances which he proposed to prove.<sup>4</sup> “A state of facts, as its name imports, is a statement in writing, made by a party who wishes to prosecute or resist any inquiry before a master, of the facts and circumstances upon which he relies, either in support of his own cause or in contradiction or defeasance of that of his adversary. It is in effect the ‘pleading’ of the party before the master, and is governed by nearly the same rules and principles as pleadings in the court, although, not being signed nor in general prepared by counsel, they are not always so strictly observed.”<sup>5</sup> It must not contain scandalous or impertinent

Nobles v. Hogg (S. C.), 15 S. E. Rep. 359.

<sup>1</sup> Adams' Equity (7th Am. ed.), 388; 2 Daniell's Ch. Pr. (5th ed.) 1172.

<sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 1178.

<sup>3</sup> 2 Smith's Ch. Pr. (3d ed.) 112; 2 Daniell's Ch. Pr. (5th ed.) 1178. Parties who are entitled to attend upon the reference are entitled to take

copies of all proceedings in writing brought into the master's office which in any way affect their interest, and will be allowed the costs of such copies in taxation. 2 Daniell's Ch. Pr. (5th ed.) 1175.

<sup>4</sup> 2 Daniell's Ch. Pr. (3d ed.) 1190.

<sup>5</sup> 2 Daniell's Ch. Pr. (5th ed.) 1190.

matter.<sup>1</sup> “When the party carrying in the state of facts makes any claim upon the fund in court, it is usual to conclude the statement with the particulars of the claim in the manner of a prayer for relief to the bill as follows:—‘And the said A. B. therefore claims,’ etc. In such case the proceeding is called ‘a state of facts and claims.’ When the object of the party is to charge another with the receipt of money, etc., the state of facts concludes with a charge in the following form:—‘And the said A. B. therefore charges,’ etc. In such case the proceeding is called ‘a state of facts and charge.’ It may be remarked that a charge is not always preceded by a state of facts, but if the matter appears from any admission in any account or examination or proceeding in the master’s office, and requires no proof in support of it, it is usual to make ‘a charge’ only. When a state of facts is prepared it is carried into the master’s office, and a warrant ‘on leaving’ must be served upon the other parties, who may then apply for and obtain copies from the master’s clerk, and if they have a counter state of facts to leave they must proceed in the same manner. It is usual to add to a state of facts a sort of petition that the party may be at liberty to add to, alter or vary the state of facts, as he may be advised; and it is presumed that such form was originally considered necessary to enable the party to amend his state of facts after it has been delivered in. It is, however, now an unnecessary form, as a state of facts may be amended at any time, or a further state of facts carried in, upon leaving which, a warrant ‘on leaving’ should be taken out and served as when an original state of facts is left.”<sup>2</sup>

§ 689. Evidence before a master.—In a reference to a master for any purpose the order need not particularly empower him to take testimony, if the subject-matter is only to be ascertained by evidence.<sup>3</sup> The general rules of evidence which govern the courts of common law, as well as the court of chancery, regulate also the proceedings in the master’s office.<sup>4</sup> A direction to inquire into a fact is in the nature of a new issue joined, and what would be evidence in any other

<sup>1</sup> 2 Daniell’s Ch. Pr. (5th ed.) 1199, 1200, 1201.

<sup>3</sup> *Story v. Livingston*, 18 Pet. 359.

<sup>4</sup> 2 Barbour’s Ch. Pr. (2d ed.) 493.

<sup>2</sup> 2 Daniell’s Ch. Pr. (5th ed.) 1200.

case will be evidence before the master.<sup>1</sup> Every sort of evidence which can be used at the hearing may be used before the master;<sup>2</sup> and the master may always take additional evidence as to matters of detail and facts affecting the application of the principles of the decree.<sup>3</sup> The United States equity rules provide that "all affidavits, depositions and documents which have been previously made, read or used in the court upon any proceedings in any cause or matter may be used before the master."<sup>4</sup> The same rules authorize the master to require the production of books and documents,<sup>5</sup> to examine on oath, *viva voce*, all witnesses produced before him, and order the examination of other witnesses to be taken under a commission, "also to direct the mode in which matters requiring evidence shall be proved before him; and generally to do all other acts and direct all other inquiries and proceedings in the matters before him which he may deem necessary and proper to the justice and merits thereof and the rights of the parties;"<sup>6</sup> and the rules further provide for bringing witnesses

<sup>1</sup>Smith v. Althus, 11 Ves. 564.

<sup>2</sup>Gresley's Eq. Ev., p. 508. The defendant's answer on oath is evidence so far as it is responsive to the complainant's bill. De Mott v. Benson, 4 Edw. Ch. 297.

<sup>3</sup>Franklin v. Meyer, 36 Ark. 96, 109; Atwood v. Shenandoah Val. R. Co., 85 Va. 966; s. c., 9 S. E. Rep. 748.

<sup>4</sup>Equity Rule 80. In Bell v. United States, 32 Fed. Rep. 549, it was held that testimony taken by the examiner for the hearing in chief, under a decree against an infringer for an accounting, which was not brought before the master in making up the case on the accounting so that it could be answered or explained on the other side, but was merely referred to in argument, and requests for findings upon the case made, was not within the foregoing rule, and an exception to the master's report for failing to find upon the point made by his testimony was overruled.

<sup>5</sup>Equity Rule 77. A master has no

power to compel a party to produce a deed. Cartee v. Spence, 24 S. C. 550.

<sup>6</sup>Equity Rule 77. He may examine witnesses on interrogatories or *viva voce*, or both. Foote v. Silsby, 8 Blatchf. 507; Story v. Livingston, 13 Pet. 359. See, also, Jackson v. Jackson, 3 N. J. Eq. 96. Equity Rule 81 provides that the master "shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or on both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary." The universal practice has been to permit the master to go outside of the territorial jurisdiction of the court, and he may take testimony in

before the master, for their compensation and for attachments for a contempt when witnesses refuse to appear on a subpoena.<sup>1</sup>

**§ 690. Examination of witnesses.**— Upon examination of a witness in a master's office the witness has a right in the master's presence, but not privately, to consult counsel, and may select the same as are employed by either party in the cause. He may demur to a question, taking upon himself the consequences. He need not answer any question which may tend to expose him to punishment, penalty or forfeiture; but though his answers might establish or tend to establish his indebtedness or liability in a civil suit, this cannot excuse him from answering. In an examination in a master's office witness and counsel are to be governed by the same rules which would control them in a court of law. Counsel are not to hold a whispering conversation with a witness, nor retire with him for private consultation; nor after consultation dictate his answers. His advice must be given under the eye and in the hearing of the master. The witness is to give his answers in his own language.<sup>2</sup>

**§ 691. Proceedings before a master.**— A United States equity rule authorizes the master to regulate all the proceedings in every hearing before him upon a reference.<sup>3</sup> It is not the

foreign countries. *Bate Refrigerating Co. v. Gillette*, 28 Fed. Rep. 678.

<sup>1</sup> Equity Rule 78. Where a person examined in a master's office refuses to answer a question, the master should pass upon and require such question to be answered before an attachment can be moved for. *Fobes v. Meeker*, 8 Edw. Ch. 452. For the practice upon proceedings for contempt see *Hammersley v. Parker*, 1 Barb. Ch. 25.

<sup>2</sup> *Stewart v. Turner*, 8 Edw. Ch. 458. Where the course of conduct pursued by a witness and his counsel was considered improper, and an adjournment was had that the court might be moved for instructions, the master gave a certificate upon

which the court was to be moved for instructions. See, also, *Gihon v. Albert*, 7 Paige, 278. The master has no power to order a person who appeared as a witness, but has not taken the stand, to remove her veil so that she may be identified by a witness who is under examination. *Rice v. Rice*, 47 N. J. Eq. 559; s. c., 21 Atl. Rep. 286, where the power of masters in respect of taking testimony under the present rules in New Jersey is examined.

<sup>3</sup> Equity Rule 77. A committee have power to adopt reasonable rules in respect to the trial of the case pending before them, for the purpose of facilitating the trial, and to prevent any undue advantage by

general practice for the court to interfere with the master's acts and proceedings *in limine*, but to wait until the coming in of his report before hearing exception by either party to any irregularity or excess of authority on his part.<sup>1</sup> A master appointed to state the account in an infringement suit in the United States circuit court for New Jersey adjourned his hearing to England on the defendant's application and against the plaintiff's objection. It was held to be a proper proceeding in the absence of proof of unreasonableness.<sup>2</sup> Under the former English practice the master could not proceed with a reference *de die in diem* without a special order from the court giving him liberty to do so.<sup>3</sup> In the federal courts, if either party shall fail to appear at the time and place appointed by the master, the latter may proceed *ex parte*, or, in his discretion, adjourn the proceedings to a future day, giving notice to the opposite party or his solicitor of such adjournment;<sup>4</sup> and it is the duty of the master to proceed with all reasonable diligence in every reference, and with the least practicable delay, and either party is at liberty to apply to the court or a judge thereof for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.<sup>5</sup>

§ 692. The same subject continued.—It is within the discretion of a master to limit the cross-examination of a witness to the exercise of which no exception lies, where it appears that a question was not so far material that its exclusion was prejudicial.<sup>6</sup> It is not the approved practice to suspend the examination of witnesses before the master in order to have the court settle whether or not testimony offered is compe-

one party over the other. *Ashmead v. Colby*, 26 Conn. 289, 311.

<sup>1</sup> *Bate Refrigerator Co. v. Gillette*, 28 Fed. Rep. 673. See *Lull v. Clark*, 20 Fed. Rep. 454; *Wooster v. Gumbirner*, 20 Fed. Rep. 167.

<sup>2</sup> *Bate Refrigerating Co. v. Gillette*, 28 Fed. Rep. 673. Rule 115 of the United States circuit court for the southern district of New York prohibits an adjournment for more than ten days without the written

consent of the parties or the permission of a judge.

<sup>3</sup> *Purcell v. M'Namara*, 11 Ves. 362.

<sup>4</sup> Equity Rule 75.

<sup>5</sup> Equity Rule 75.

<sup>6</sup> *Nichols v. Ela* (1878), 124 Mass. 333. See, also, *Jackson v. Jackson*, 3 N. J. Eq. 96, applying the same rule where the cross-examination was allowed to extend to improper matters.



tent, material or relevant. Such questions should ordinarily be reserved until the hearing on the report.<sup>1</sup>

**§ 693. Accounting before the master.**—A United States equity rule requires all parties accounting before a master to bring in their respective accounts in the form of debtor and creditor,<sup>2</sup> and provides that any of the parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.<sup>3</sup> Where a party is required to bring in his account before the master in the form of debtor and creditor, he must bring in his whole account and for the whole time for which he is accountable, as established by the decretal order of the court. The account must also be accompanied by the usual affidavit of the party that the account, including both debits and credits, is correct, and that he does not know of any error or omission in the account to the prejudice of any of the other parties.<sup>4</sup>

**§ 694. Master's report.**—Master's reports are either general or separate. General reports embrace the whole matter referred to the master by a particular decree or order.<sup>5</sup> If

<sup>1</sup> *Rusling v. Bray*, 87 N. J. Eq. 174; *Episcopal Church v. Jaques*, 3 Johns. Ch. 77. In all matters of account the party who produces vouchers in support of his account produces them at his peril, and the master is bound to admit them in evidence unless the other side can lay a reasonable ground to show that the voucher in question can be impeached, of which the master is to judge and then to require evidence in regard to it, if he thinks proper. Vouchers are *prima facie* evidence of disbursements, and are competent as evidence without proof. Of course, if the master doubts the payment, he may require proof besides the voucher. *Halsted v. Tyng*, 29 N. J. Eq. 86.

<sup>2</sup> Equity Rule 79. For proceedings to enforce the production of proper accounts, see *Kerosene Lamp Heater Co. v. Fisher*, 1 Fed. Rep. 91.

<sup>3</sup> Equity Rule 79.

<sup>4</sup> *Story v. Brown*, 4 Paige, 112. A party in an account before a master is not to be allowed anything under the head of general expenses without specifying particulars. *Methodist*

<sup>5</sup> *Daniell's Ch. Pr.* (5th ed.) 1294.

any of the inquiries directed by the decree are such as cannot conveniently be delayed until the general report, the master may make a separate report, which is prepared, disputed and confirmed in the same manner as a general one; the only difference being that when it is intended to act on such a report the cause is not set down for further directions, but a petition is presented praying such directions as are consequent on the separate report.<sup>1</sup> It is the duty of the master to make his report conform to the directions of the decree.<sup>2</sup> The province of the master is to report facts and not the mere evidence of facts,<sup>3</sup> nor arguments for the information of the court.<sup>4</sup> The plaintiff cannot claim a decree upon a report in which the fact which lies at the foundation of his claim is neither directly found nor appears with reasonable certainty by necessary inference.<sup>5</sup> If the conclusion which the master is required to

<sup>1</sup> Adams' Equity (7th Am. ed.), 885.

<sup>2</sup> Hays v. Hays, 8 Tenn. Ch. 88; Maury v. Lewis, 10 Yerg. 115.

<sup>3</sup> Goodman v. Jones, 26 Conn. 267; West v. Howard, 20 Conn. 581. But he should generally present the facts upon which the court are to decide whether fraud is constructively to be inferred rather than to find whether such fraud exists. Brainerd v. Arnold, 27 Conn. 617, 627. See, also, Callender v. Colegrove, 17 Conn. 1. The finding by a committee that a tender of a conveyance of land has been made is a finding of fact, although involving the question as to what in law constitutes a tender. Ashmead v. Colby, 26 Conn. 290. It is not necessarily a ground of exception to a report that certain articles were "necessaries" for a family that the master does not state all the facts upon which his finding is based. Winship v. Waterman, 56 Vt. 181. On an issue as to whether a certain transaction was an absolute sale or a pledge, a finding by the master that, "upon all the testimony in the case, I am of the opinion that the transaction was a pledge," is not a conclusion

of law, but a fact found from the evidence. Morrell v. Kelly (Mass.), 81 N. E. Rep. 755.

<sup>4</sup> Jackson v. Jackson, 8 N. J. Eq. 96.

<sup>5</sup> Johnson v. Sanford, 18 Conn. 461, 467. "The ordinary mode of framing a report is to refer separately to each of the directions in the decree, and then, with respect to each direction, first to mention on what evidence the master has proceeded, and then to state the conclusion at which he has arrived. In stating his conclusion he should so far detail the facts which warrant it as may enable the court to judge of its correctness; and it is frequently advantageous, though not necessary, that he should also state the reasons which have induced his decision. But he must not omit the conclusion itself, or state evidence, or circumstances which are presumptive evidence, without finding whether they amount to a satisfactory proof." Adams' Equity (7th Am. ed.), 884. "While the report of the master should not, on the one hand, contain copies of the depositions at length, it should not, upon the other, be a mere skeleton present-

draw is a question of law and not a mere legal presumption of a fact, he is permitted, in the exercise of a sound discretion and without an order for that purpose, to make a special report submitting the legal question to the decision of the court.<sup>1</sup>

**§ 695. Draft report and objections thereto.**— Under the former English practice the master made a draft of his report, notified counsel of his findings, gave them an opportunity to point out errors, and the master considered and corrected them.<sup>2</sup> Such was also the practice in the federal courts in chancery prior to the adoption of the equity rules,<sup>3</sup> and it still obtains in some of the circuits.<sup>4</sup> Under the practice in New

ing nothing more than a grim array of figures. The items in it should be numbered; and where these items rest upon accounts, receipts or other vouchers they should be numbered correspondingly; and where they are supported by depositions the pages of the depositions should be referred to; and when any question arises as to what the master deems it his duty to report or as to what he is unable to report, he should state the facts briefly and refer to the pages of the depositions or documentary evidence upon which he relies. A master should not be deterred by the apprehension of being charged with a desire to increase his fees from stating the grounds of his action in a concise and intelligible manner." Per Nelson, J., in *Green v. Lanier*, 5 Heisk. 662, 671.

<sup>1</sup> *In re Hemiup*, 8 Paige, 305. In Texas auditors to whom partnership accounts are referred have authority to report their conclusions, both of fact and law, in the premises. *Richie v. Levy*, 69 Tex. 188; s. c., 6 S. W. Rep. 685. In *Trigg v. Trigg* (Tex.), 18 S. W. Rep. 813, it was held to be improper to report the authority and proceedings under which the report was made. In *Holt v. Holt* (West Va.), 16 S. E. Rep. 675, it was held to

be the duty of a commissioner to return the decrees, orders and notices under which he acted, in order that the court may see that they have been properly executed. Where a statute requires all computations to be made in dollars and cents, it is irregular to insert fractions of a cent in a master's report. *Dumont v. Nicholson*, 2 Barb. Ch. 71. Upon a reference to a master to ascertain who are entitled to the surplus moneys brought into court in a foreclosure suit, the report on its face should show that all persons entitled to notice to attend upon the reference were duly summoned. *Franklin v. Van Cott*, 11 Paige, 129.

<sup>2</sup> *Fidelity Ins. Co. v. Shenandoah Iron Co. (Va.)*, 42 Fed. Rep. 372, 374.

<sup>3</sup> *Fidelity Ins. Co. v. Shenandoah Iron Co. (Va.)*, 42 Fed. Rep. 372, 374.

<sup>4</sup> *Celluloid Mfg. Co. v. Cellonite Mfg. Co. (N. Y.)*, 40 Fed. Rep. 476; *Nail Factory v. Corning (N. Y.)*, 6 Blatchf. 328. See, however, *Jennings v. Dolan (N. Y.)*, 29 Fed. Rep. 861, holding that exception to a principal finding of a master based on all the evidence in his report need not be made when he submits his draft report, but may be made before the court. *Hatch v. Railroad Co.*, 9 Fed. Rep. 856; *Fidelity Ins. Co. v. Shenan-*

Jersey the master takes the testimony and hears the arguments of counsel, and thereupon makes up and files his report without notice to the respective counsel.<sup>1</sup>

§ 696. **Master's report on accounts.**—A master's report should show in what way he arrived at his conclusion so as to enable the court to ascertain from the report itself whether his method was right or not, especially in a case where more than a simple computation of the amount due is necessary;<sup>2</sup> and when a report is made upon accounts exhibited to the master, such accounts should accompany the report that the court may see the correctness of the master's inferences.<sup>3</sup> The master should state the account at length and all the facts found by him, so that they will be intelligible without reference to the testimony.<sup>4</sup> He should state what items are allowed and what disallowed,<sup>5</sup> and so present them that they may be pointed out by exceptions to the report.<sup>6</sup> He may

doah Iron Co. (Va.), 42 Fed. Rep. 372, 374. Objections to the report of a master upon a reference to state an account after the draft of the report is prepared may be taken and argued by a party who has not previously appeared before the master, but he cannot introduce any new matter in evidence to support such objections. *Byington v. Wood*, 1 Paige, 145.

<sup>1</sup> *Van Ness v. Van Ness*, 32 N. J. Eq. 729.

<sup>2</sup> *Frazier v. Swain*, 36 N. J. Eq. 156; *Moore v. Huntington*, 17 Wall. 417; *Robertson v. Baker*, 11 Fla. 192; *June v. Myers*, 12 Fla. 310.

<sup>3</sup> *Jeffrey v. Yarborough*, 2 Hawks, 307.

<sup>4</sup> *Herrick v. Belknap*, 27 Vt. 673.

<sup>5</sup> *Reed v. Jones*, 15 Wis. 40. It is not a sufficient reason for setting aside the report of a committee that it does not definitely find the amount of a balance due where the items allowed are so stated that the court can ascertain the balance and render

a proper judgment. *Morris v. Peckham*, 51 Conn. 128. See, also, *Patterson v. Kellogg*, 53 Conn. 38.

<sup>6</sup> *Ransom v. Davis*, 18 How. 295. A report stating the accounts of a mercantile firm should show whether the partnership resulted in a profit or loss and to what extent. *Zimmerman v. Huber*, 29 Ala. 379; *Hicks v. Chadwell*, 1 Tenn. Ch. 251. The master's report that he finds a balance in favor of a partner in book A, and a balance against him in another book, is not a sufficient statement of an account. *Nims v. Nims*, 20 Fla. 204. In taking such accounts the partnership books must, if not successfully impeached by the pleadings and proofs, be taken as *prima facie* sufficient, and if lost or destroyed the best evidence is proof of their contents. *Hicks v. Chadwell*, 1 Tenn. Ch. 251. Where a master is ordered to state an account, and one of the parties makes a sworn statement of the account, and the other offers no better evidence, the master is justi-

state the result of the account with items rejected in the body of his report, and refer to schedules filed therewith for particular items entering into the account.<sup>1</sup>

**§ 697. Report of testimony.**—Where it is referred to a master to examine and report as to particular facts, or as to any other matter, it is his duty to draw the conclusions from the evidence before him, and to report such conclusions only; and it is generally deemed irregular and improper to set forth the evidence in his report without the special direction of the court.<sup>2</sup> Such an order, however, is a matter of discretion

fied in accepting the statement as true. *Farwell v. Huling*, 132 Ill. 112; s. c., 23 N. E. Rep. 488.

<sup>1</sup>*Craig v. McKinney*, 72 Ill. 314. "The mode adopted is not, however, material so that the items of account are in some convenient way designated and the master's ruling thereon made sufficiently to appear." *Snell v. De Land*, 186 Ill. 533; s. c., 27 N. E. Rep. 707.

<sup>2</sup>*In re Hemiup*, 3 Paige, 805; *Nichols v. Ela*, 124 Mass. 333, 336; *Evans v. Evans*, 2 Cold. (Tenn.) 151. At the request of a party he should report so much of the evidence as is necessary to bring before the court any question of law raised at the hearing; and he may also report the evidence bearing upon any question of law, which in his discretion he thinks ought to be referred to the court. *Parker v. Nickerson*, 187 Mass. 487. United States Equity Rule 76 provides that "in the reports made by the master to the court no part of any state of facts, charge, affidavit, deposition, examination or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination or answer shall be identified, specified and referred to so as to inform the court what state of facts, affidavit, deposition, examina-

tion or answer were so brought in or used." See *McCormack v. James*, 86 Fed. Rep. 14. Sometimes the order directs the master to report the testimony, or to report it if either party requires it, in which cases the testimony should be annexed, certified by him, but not embodied in the report. 1 *Hoffman's Ch. Pr.* 545; *Matter of Hemiup*, 3 Paige, 805; *Mott v. Harrington*, 15 Vt. 185. "The practice in this State has been for the master not to report the testimony given orally before him unless directed to do so by the decree, or requested to do so by the parties or one or other of them. The practice is the same in some of the other States." *Clapp v. Sherman* (R. L.), 17 Atl. Rep. 130, 131, citing *Howe v. Russell*, 36 Me. 115; *Simmons v. Jacobs*, 52 Me. 147; *Renell v. Kimball*, 5 Allen, 364; *Sparhawk v. Willa*, 5 Gray, 423. See *Bailey v. Myrick*, 52 Me. 132; *Mason v. Cumberland & C. R. Co.*, 52 Me. 82; *Jackson v. Jackson*, 8 N. J. Eq. 96; *Freeland v. Wright*, 154 Mass. 492; s. c., 28 N. E. Rep. 678. In West Virginia if a commissioner's report is not excepted to before it is returned into court, the evidence on which he acted is no part of the report, unless made so by the report or by order of court, and will not otherwise be considered. *Chapman v. McMillan*, 27 West Va.

with which the appellate court will not interfere, unless in cases of manifest injustice.<sup>1</sup>

§ 698. Amendment of report.— A master, by leave of the court, may amend his report by correcting an error of expression so as to correctly present the result at which he has arrived.<sup>2</sup> But where a report has been followed by an order or decree for the payment of the balance as found due by the master, it cannot be amended while the order or decree founded thereon remains in full force.<sup>3</sup>

§ 699. Confirmation of report.— Wherever the discretion of the court is exercised upon the first order, and where the master is only called upon to perform some act or make some inquiry necessary for carrying out the order which the court has made, the report of the master will not require confirmation.<sup>4</sup> But where the report is required for the purpose of enabling the court to make some discretionary order or decree, whether the order directing the reference be made upon a decree or upon any interlocutory application, the report requires confirmation before it is adopted as the foundation of such future order or decree.<sup>5</sup> Where a defendant is entitled to notice of proceedings before a master, under an order of reference, a rule *nisi* to confirm the master's report should be taken.<sup>6</sup> The usual order *nisi*, which is entered upon

220; *Anderson v. Caraway*, 27 West Va. 385. See, also, *Arnold v. Slaughter* (West Va.), 15 S. E. Rep. 250; *Holt v. Holt* (West Va.), 16 S. E. Rep. 675; *Harper v. McVeigh*, 82 Va. 751; s. c., 1 S. E. Rep. 198. Where the master is required to report the evidence, an objection for failure to do so should not be taken by exception but by motion to the court to refer the report back or to order the evidence to be sent up. *Miller v. Miller*, 26 N. J. Eq. 423.

<sup>1</sup> *Arnold v. Slaughter* (West Va.), 15 S. E. Rep. 250; *Freeland v. Wright*, 154 Mass. 492; s. c., 28 N. E. Rep. 678. After a case has been heard before a master and his draft report is sub-

mitted to the parties, the court will not ordinarily require him to file a report of the evidence. *Parker v. Nickerson*, 187 Mass. 487. Nor allow the order of reference to be amended for that purpose. *Nichols v. Ela*, 124 Mass. 338.

<sup>2</sup> *Heywood v. Miner*, 102 Mass. 466, holding that the notice required by the thirty-first rule in chancery was not necessary in such a case.

<sup>3</sup> *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 573.

<sup>4</sup> *Daniell's Ch. Pr.* (5th ed.) 1304.

<sup>5</sup> *Daniell's Ch. Pr.* (5th ed.) 1305.

<sup>6</sup> *Miller's Adm'r v. Miller*, 26 N. J. Eq. 423; *Weber v. Weitling*, 8 C. E. Gr. 39. United States Equity Rule

the filing of such report, becomes absolute at the expiration of eight days, except as to the matters embraced in the exceptions to the report. And a decretal order, made upon the exceptions, need not direct the report to be confirmed as to those parts thereof which are not directed to be altered or reconsidered by the master.<sup>1</sup>

**§ 700. Province of exceptions.**—The province of exceptions to the report of a master is to call in question the conclusions to which he may have come upon the subject referred to him.<sup>2</sup> The report of a master upon a question not referred to him by the court is erroneous and subject to exception by the party aggrieved.<sup>3</sup> Where a master finds in favor of a plea of former suit pending, and the complainant is dissatisfied, his course is to except to the report and in this way bring the matter before the court.<sup>4</sup>

**§ 701. The same subject continued.**—A party cannot, by excepting to a master's report which has been properly made pursuant to the directions of the court as contained in the order of reference, indirectly review the decision of the court in giving such directions. But if he is dissatisfied with the order of reference he must appeal, or apply for a rehearing.<sup>5</sup>

§8 provides that if no exceptions are filed within a month after the filing of the report, it shall stand confirmed on the next rule day after the month is expired.

<sup>1</sup> *Clark v. Willoughby*, 1 Barb. Ch. 68. A notice of hearing on the master's report is good though dated on Sunday and left at the solicitor's dwelling-house in his absence. *Taylor v. Thomas*, 2 N. J. Eq. 106.

<sup>2</sup> *Douglass v. Merceles*, 24 N. J. Eq. 25, 26; *Weber v. Whiting*, 18 N. J. Eq. 89. Objections to a master's report, based upon his findings, and not upon misconduct, are properly made by exceptions. *Hall v. Westcott* (R. I.), 23 Atl. Rep. 25. If there be error apparent on the report, as, for example, if the facts stated contradict the conclusion, it is not nec-

essary to except. *Adams v. Claxton*, 6 Ves. 226; *Ottey v. Pensam*, 1 Hare, 326; *Gregory v. West*, 3 Beav. 541; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 40 Fed. Rep. 476; *Adams' Equity* (7th Am. ed.), 386.

<sup>3</sup> *Taylor v. Robertson*, 27 Fed. Rep. 587. If the master improperly rejects the claim of a creditor coming in under the notice in a partition suit, as to his lien on the premises, the claimant must except to the master's report if he wishes to preserve his lien upon the purchase-money for which the premises were to be sold under the decree. *Dunham v. Minard*, 4 Paige, 441.

<sup>4</sup> *Dickinson v. Codwise*, 4 Edw. Ch. 341.

<sup>5</sup> *Clark v. Willoughby*, 1 Barb. Ch. 68. "If a party has any ground for

The only matter that can be considered upon exceptions to a master's report is the validity of the exceptions. The question whether there should have been a reference, having been considered and determined when the order was made, cannot be reviewed on the argument on the exceptions.<sup>1</sup>

**§ 702. Objections for irregularities.**—Irregularities in the master's proceedings or neglect to report on the matters referred are properly brought before the court by motion to set aside the report or to refer it back to be perfected. It is not correct practice to except to the report in such cases.<sup>2</sup> A master's report cannot be excepted to for irrelevancy or impertinence. The proper course in such a case is to apply to the court by motion to expunge the impertinent matter if either party is aggrieved by the introduction of such matter into the report.<sup>3</sup> So a finding of facts cannot be impeached, upon a remonstrance, by showing that the evidence on which it was made was procured by bribery and corruption; the

setting aside the report which does not appear in the record, his remedy must be sought in some other mode than by filing exceptions. He cannot, by exceptions to a report, have the benefit of a rehearing, or of a bill of review, or of an original bill." Cooper, J., in *Myers v. James*, 4 Lea, 370, 372. When a question as to the date from which interest shall run has been decided by the court after full hearing on a motion for final decree, such decision is binding on a special master to whom the case is referred to take an account, and cannot be again raised by exceptions to his report. *Nashua &c. Corp. v. Boston &c. Corp.*, 49 Fed. Rep. 774.

<sup>1</sup> *National Bank v. Sprague*, 28 N. J. Eq. 81. A defendant who has permitted a bill for account against himself and his partner to be taken as confessed against him cannot question his liability to account by exception to a master's report, which,

pursuing the order of reference, holds him to account. *Miller v. Howard*, 26 N. J. Eq. 166. Where a reference was made by consent, after answer, but before the cause had been set down, it was held to be no ground of exception to the master's report. *Smith v. Frenche* (1877), 28 N. J. Eq. 116. See, also, *Lord v. Sill*, 28 Conn. 324.

<sup>2</sup> *Douglass v. Merceles*, 24 N. J. Eq. 25, 26; *Tyler v. Simmons*, 6 Paige, 127; *De Mott v. Benson*, 4 Edw. Ch. 297; *Stevenson v. Gregory*, 1 Barb. Ch. 72. A refusal by a master to adjourn an examination at request of counsel of some of the defendants to afford him an opportunity to produce witnesses in behalf of those whom he represents, should he conclude to do so, is good cause for a motion to set aside the report. *Douglass v. Merceles*, 24 N. J. Eq. 25, 26.

<sup>3</sup> *Tyler v. Miller*, 6 Paige, 127.



remedy in such case being by an application to the master or to the court for a further hearing.<sup>1</sup>

§ 703. **Waiver of irregularities.**— If a party wishes to apply to set aside a master's report for irregularities he should obtain an order to enlarge the time for filing his exceptions and in the meantime apply to the court to set aside the report for irregularity.<sup>2</sup> Objections cannot be made to the regularity of the report after the party making the objections has filed exceptions with knowledge of the irregularities.<sup>3</sup> An objection that a master's report was "delivered to the plaintiff and by him handed to the clerk, sealed up, and by him filed in court without notice to the defendant," must be taken by motion before filing exceptions to the substance of the report.<sup>4</sup>

§ 704. **Objections preliminary to exceptions.**— According to strict chancery practice, no exceptions to a master's report can be made which were not taken before the master, the object being to save time and to give him an opportunity to correct his errors and to reconsider his opinions. A party neglecting to bring in exceptions before the master cannot afterwards except to the report, unless the court, on motion, see reason to be dissatisfied with the report and refer it to the master to re-examine it, with liberty to the parties to make objections to it.<sup>5</sup> This was formerly the practice in the federal courts,<sup>6</sup> but since the adoption of the rule allowing one month for the filing of exceptions,<sup>7</sup> the practice has not been adhered to in all the circuits.<sup>8</sup> The court may

<sup>1</sup> *Ashmead v. Colby*, 26 Conn. 290.

<sup>6</sup> *Story v. Livingston*, 18 Pet. 359;

<sup>2</sup> *Tyler v. Simmons*, 6 Paige, 127.

*Fidelity Ins. Co. v. Shenandoah*, 42

<sup>3</sup> *Tyler v. Simmons*, 6 Paige, 127;

*Fed. Rep.* 372, 374.

*Johnson v. Swart*, 11 Paige, 385.

<sup>7</sup> Equity Rule 88.

<sup>4</sup> *Lamson v. Drake*, 105 Mass. 564.

<sup>8</sup> See *Fidelity Ins. Co. v. Shenandoah*

<sup>5</sup> *Story v. Livingston*, 18 Pet. 359;

*doah* (Va.), 42 Fed. Rep. 372, 374;

*Byington v. Wood*, 1 Paige, 145;

*Jennings v. Dolan* (N. Y.), 29 Fed.

*Methodist Episcopal Ch. v. Jaques*,

*Rep.* 861; *Celluloid Mfg. Co. v. Cel-*

*Johns. Ch.* 77. See *Lewis v. Lewis*,

*lonite Mfg. Co.* (N. Y.), 40 Fed. Rep.

*Minor* (Ala.), 35; *Colgin v. Cum-*

*476; Hatch v. Indianapolis &c. R.*

*mings*, 1 Porter (Ala.), 148; *Mechan-*

*Co.*, 9 Fed. Rep. 856; *Troy Nail Fac-*

*ics' Bank v. Bank of New Brunswick*,

*tory v. Corning* (N. Y.), 6 Blatchf

8 N. J. Eq. 487.

328; *Fischer v. Hayes*, 16 Fed. Rep.

allow objections in support of exceptions to be filed *nunc pro tunc*.<sup>1</sup>

§ 705. **Form of exceptions.**— Exceptions to the report of a master are in the nature of a special demurrer, and must point out the errors specifically,<sup>2</sup> and with as much certainty

469. Where the master by his draft report states the facts correctly but errs as to the legal conclusion, the party against whom he errs is not required to except to the report, but may bring the question to the attention of the court upon further directions; or, if the report is made pursuant to an interlocutory decree, when the case comes on to be disposed of by a final decree. *Celluloid Mfg. Co. v. Cello-nite Mfg. Co.*, 40 Fed. Rep. 476. An exception to the master's report will not be sustained on account of the admission of incompetent testimony when the record does not show that any objection to it was made before him. *Goodwin v. Fox*, 129 U. S. 601. See, also, *Johnson v. Meyer* (Ark.), 16 S. W. Rep. 121. Where a party produces and examines a witness before a master but neglects to inquire as to a particular item in the account which the witness alone could explain, he cannot afterwards except to the report of the master as incorrect in regard to such item. *Barrow v. Rhinelander*, 8 Johns. Ch. 614.

<sup>1</sup> *Fischer v. Hayes*, 16 Fed. Rep. 469.

<sup>2</sup> *Story v. Livingston*, 18 Pet. 359; *Dexter v. Arnold*, 2 Sumner, 108; *Newcomb v. White* (N. Mex.), 28 Pac. Rep. 671; *Richie v. Levy*, 69 Tex. 188; s. c., 6 S. W. Rep. 685; *Dwyer v. Kalteyer*, 68 Tex. 554; s. c., 5 S. W. Rep. 75; *Foster v. Gressett*, 29 Ala. 393; *Brantley v. Gunn*, 29 Ala. 387; 14 Am. & Eng. Encyc. of Law, 947; *Booth v. Penser*, 1 Irish Eq. 84; especially *Green v. Lanier*, 5 Heisk. 662, 670. Exceptions to the master's report are regarded so far only as

they are supported by the statements of the master, or by evidence to which the attention of the court is called by reference to the particular testimony. *Jaffrey v. Brown*, 29 Fed. Rep. 476; *Jones v. Lamar*, 39 Fed. Rep. 585; *Cutting v. Florida Ry. & Co.*, 48 Fed. Rep. 743, 747; *Greene v. Bishop*, 1 Cliff. 186; *Jones v. Keen*, 115 Mass. 171; *Miller v. Whittier*, 36 Me. 585; *Singer v. Steele*, 125 Ill. 426; *Dunnell v. Henderson*, 23 N. J. Eq. 175. The court does not investigate the items of an account, nor review the whole mass of testimony taken. *Harding v. Handy*, 11 Wheat. 103, 104; *Snell v. De Land*, 186 Ill. 533; s. c., 27 N. E. Rep. 707. A defendant may take one general exception to a master's report so far as it is against him. But he does it at his peril if it is found that his exception covers too much. *Higbie v. Brown*, 1 Barb. Ch. 320; *Hodges v. Salomons*, 1 Cox, 249; *Ashmead v. Colby*, 26 Conn. 287; 2 Daniell's Ch. Pr. (5th ed.) 1815, n. But see *Hoare v. Johnstone*, 4 Myl. & C. 127. "Exceptions to a report are in the nature of a special demurrer, and must distinctly point out the discrepancy between the report and the record on which it is based. *Ridley v. Ridley*, 1 Cold. 382. A speaking demurrer is clearly bad, and speaking exceptions must be equally so and for the same reason. The court cannot go outside of the record to act upon them. *Goddard v. Cox*, 1 Lea, 118; *Childress v. Harrison*, 1 Baxt. 410." *Cooper, J.*, in *Myers v. James*, 4 Lea, 370, 372.

as is necessary in pleading.<sup>1</sup> But all that is required is that "the exception should distinctly point out the finding and the conclusion of the master which it seeks to reverse."<sup>2</sup> It is irregular for a party, by new exceptions to a master's amended report, to raise the same questions which have been considered and decided by the court on the exceptions to the original report.<sup>3</sup> Exceptions are usually prepared and must be signed by counsel.<sup>4</sup>

§ 706. The same subject continued.—The general objection "irrelevant and incompetent," made before the master, is not sufficiently specific to be considered on the hearing.<sup>5</sup>

<sup>1</sup> *Holabird v. Burr*, 17 Conn. 556, 560; *Kader v. Geargin*, 85 Tenn. 486; s. c., 3 S. W. Rep. 178; *Ridley v. Ridley*, 1 Cold. (Tenn.) 332; *Musgrove v. Lusk*, 2 Tenn. Ch. 576; *Green v. Lanier*, 5 Heisk. 670.

<sup>2</sup> *Foster v. Goddard*, 1 Black, 506, 509; *Fidelity Ins. Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 372, 374. When exceptions to a master's report are demurred to on the ground that they "do not plainly and distinctly state the finding or decision complained of and the error committed," this does not raise the objection that the exceptions are not separately classified as exceptions of law and exceptions of fact. *Pool v. Gramling* (Ga.), 16 S. E. Rep. 52. The failure to note at the foot of each exception to conclusions of fact the evidence on which it rests, as required by a rule of court, is sufficient ground for overruling all the exceptions. *Crump v. Crump*, 69 Ala. 156; *Mooney v. Walter*, 69 Ala. 75; *Kilpatrick v. Henson*, 81 Ala. 464; s. c., 1 So. Rep. 188. Parts not excepted to, unless erroneous upon the face of the report, are admitted to be correct, not only as regards the principles, but also as relates to the evidence on which they are founded. *Thompson v. Catlett*, 24 West Va. 524, 540; *Perkins v. Saunders*, 2 Hen. &

M. 420; *Wyatt v. Thompson*, 10 West Va. 645; *Smith v. Smith*, 4 Johns. Ch. 445; *Hyman v. Smith*, 10 West Va. 298; *Baxter v. Blodgett* (Vt.), 22 Atl. Rep. 625; *Alderson v. Nagle*, 14 West Va. 218; *Scofield v. Stoddard*, 58 Vt. 290; *Chapman v. Chalfant*, 14 West Va. 581; *Appeal of Dickey* (Pa.), 7 Atl. Rep. 577; *Ward v. Ward*, 21 West Va. 262; *Singer v. Steele*, 125 Ill. 426; *Wilkes v. Rogers*, 6 Johns. 566; *Smalley v. Corliss*, 37 Vt. 486; *O'Reilly v. Brady*, 28 Ala. 580; *Himelley v. Rose*, 5 Cranch, 318; *Shipman v. Fletcher*, 88 Va. 349; s. c., 2 S. E. Rep. 198. Items or matters excepted to in the report of a commissioner, which by the court is recommitted, will not be open to judicial investigation in acting upon the report made upon such recommitment, unless such items or matters are excepted to in the latter report. *Hooper v. Hooper's Ex'rs*, 29 West Va. 276; s. c., 1 S. E. Rep. 280; *Carskadon v. Minke*, 26 West Va. 729.

<sup>3</sup> *Clark v. Willoughby*, 1 Barb. Ch. 68.

<sup>4</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1816.

<sup>5</sup> *Hamilton v. Southern Nev. G. & L. M. Co.*, 38 Fed. Rep. 562. If an exception to the report of a master shows merely that a question to a witness was excluded, and the ma-

An exception to the aggregate amount of items in an account as stated by the master, and to "any part thereof," without designating any particular item or any ruling of the master, is too general to be availing.<sup>1</sup> Under a general exception to a master's report to the allowance of interest, the exceptant is not entitled to object to the rate of interest allowed.<sup>2</sup> Where a master's report had given priority to certain labor and supply claims under an unconstitutional statute, which was in contravention of the general rules of equity, it was held not necessary, on exceptions thereto, to allege the unconstitutionality of the act.<sup>3</sup>

**§ 707. Time for filing exceptions.**— Exceptions to a master's report should not be taken until the report has been filed.<sup>4</sup> In the federal courts the parties have one month from the time of filing the report to file exceptions thereto.<sup>5</sup> If exceptions not filed within that time are received and acted upon without objection, the default is waived.<sup>6</sup> The term "month," as used in the rule, means a calendar and not a lunar month.<sup>7</sup> A report returned into court sealed up and indorsed "Fees to be paid before opening" is not "filed" within the meaning of the rule.<sup>8</sup>

**§ 708. Extension of time.**— When exceptions have not been filed within the time allowed for that purpose, it is within the discretion of the court to permit them to be filed thereafter upon proper cause shown.<sup>9</sup> The application for such indul-

teriality of the question does not appear in the record, the exception will be overruled. *Fletcher v. Reed*, 181 Mass. 812. Exceptions to the master's ruling on evidence, made before him, need not be repeated in the exceptions to his report. *Marks v. Fox*, 18 Fed. Rep. 718.

<sup>1</sup> *Snell v. De Land*, 186 Ill. 533; s. c., 27 N. E. Rep. 707.

<sup>2</sup> *Baker v. Mayo*, 129 Mass. 517.

<sup>3</sup> *Fidelity Ins. Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 372. See, also, *Boesch v. Graff*, 138 U. S. 697.

<sup>4</sup> *Daniell's Ch. Pr.* (5th ed.) 1312.

<sup>5</sup> Equity Rule 88: *Fidelity Ins. &c.*

*Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 372.

<sup>6</sup> *Ex parte Jordan*, 94 U. S. 248. Exceptions filed out of time must be objected to by motion. *Bryant v. McCollum*, 4 Heisk. 511.

<sup>7</sup> *Gasquet v. Crescent City Brewing Co.*, 49 Fed. Rep. 498.

<sup>8</sup> *Donaldson v. Johnson* (R. L.), 16 Atl. Rep. 140.

<sup>9</sup> *Stewart v. Crane*, 87 Ga. 328; s. c., 18 S. E. Rep. 552; *Hoppock v. Ramsey*, 28 N. J. Eq. 166. See, also, *Miller v. Miller*, 26 N. J. Eq. 423.

Where the exceptions are not specific enough, and the cause can be re-

gence must be seasonably made, or a reasonable excuse given for delay, as well as for failure to comply with the rule.<sup>1</sup> It is not sufficient ground for granting further time that counsel did not know the report was filed.<sup>2</sup> A statute providing that a master's report, when returned to "court," shall be subject to exceptions for such time as the "court" may allow, does not confer on a judge at chambers any authority to pass an *ex parte* order extending the time for filing such exceptions beyond the time originally fixed by the court for that purpose.<sup>3</sup>

**§ 709. The same subject continued.**—Where a receiver, not in his capacity as trustee, but for himself and against the trust estate, provokes a contest adversely to all others in interest by presenting to the court a claim for compensation, and the matter is referred to a master, his report, so far as exception thereto is concerned, falls within the federal rule<sup>4</sup> providing that the report shall stand confirmed on the next rule-day after the month has expired without the filing of exceptions; and the court will not hear exceptions thereafter unless the party was prevented from making them in time through accident, surprise, mistake or fraud.<sup>5</sup>

assigned for hearing without prejudice to the interests of the parties or the pending business, the court may grant time and leave to amend the exceptions. *Jones v. Lamar*, 89 Fed. Rep. 585.

<sup>1</sup> *Cook v. Corning*, 62 Ga. 228; *Burnett v. State*, 87 Ga. 622; s. c., 18 S. E. Rep. 552.

<sup>2</sup> *Clapp v. Sherman* (R. I.), 17 Atl. Rep. 180.

<sup>3</sup> *Stewart v. Crane*, 87 Ga. 328; s. c., 18 S. E. Rep. 552.

<sup>4</sup> Equity Rule 88.

<sup>5</sup> *Gasquet v. Crescent City Brewing Co.*, 49 Fed. Rep. 493, conceding the rule to be that the receiver's accounts involving his receipts and expenditures as trustee are liable to question at any time before the cause is closed by a final decree. "The effect of such a state of facts," said Billings, J., in the case cited, "as far as re-

lates to the cutting off of exceptions, is analogous to the effect of a judgment after the term at which it was rendered had terminated; that is, the rule, as a general canon, precludes subsequent exceptions. However, a court would, while the fund is under the control of the court, still hear exceptions from those who had been prevented from making them within the time fixed by the rule through accident, surprise, mistake or fraud. As to all others the rule is absolute. In *Foster v. Van Ranst*, 1 Hill's Eq. 185, the precise point was passed upon, and the court refused to consider exceptions because not filed within the time of the rule and accompanied by proof of the facts constituting an equity which would take the case out of the rule. There the equity asserted arose from the inadvertence of the exceptor and could

§ 710. **Argument of exceptions.**—Either party may set down the exceptions to a master's report for argument.<sup>1</sup> The order setting down the exceptions must be entered and served before the expiration of the time in the rule *nisi* or the report will be confirmed.<sup>2</sup> It is not proper that the argument of the exceptions to a master's report, and of a special motion to set it aside for irregularity or to send it back, should be heard together.<sup>3</sup> Where exceptions are taken it is not necessary for the court formally to allow or disallow them on the record. It will be sufficient if it appears from the record that all of them have been considered by the court and allowed or disallowed, and the report confirmed accordingly.<sup>4</sup> The findings of the master are *prima facie* correct, and the burden of sustaining the exceptions is upon the objecting party.<sup>5</sup> Where the court, upon exceptions to the master's report, rules upon the scope of the order of reference, the appellate court will not adopt a contrary construction unless it is made clear that injustice has resulted.<sup>6</sup>

have been shown by simple affidavit. Here the excuse for the delay was claimed to lie in the fraudulent devices or misrepresentations of the receiver whereby the exceptor was misled into inaction; and therefore upon presentation of the petition the court ordered full investigation before the master who has found against the petitioners—that is, that the allegations of fraud have not been sustained by the proof." See *Slee v. Bloom*, 7 Johns. Ch. 137; *Seigle v. Seigle*, 36 N. J. Eq. 397; 2 Daniell's Ch. Pr. (5th ed.) 1813, 1814; *Potts v. Potter*, 2 Dev. Ch. 281.

<sup>1</sup> *Union Sugar Refinery v. Mathieson*, 8 Cliff. 146, 149; *Stafford v. Rogers*, Hopk. Ch. 98; *Morris v. Taylor*, 28 N. J. Eq. 181. "If exceptions are filed they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise." *United States Equity*

Rule 83. Independently of rules of court the practice is for the defendant to bring on the hearing on the exceptions. Filing exceptions is not alone sufficient cause against making absolute the order to confirm the report *nisi*; an order for setting down the exceptions to be argued must also be obtained by the defendant. *Brundage v. Goodfellow*, 8 N. J. Eq. 513.

<sup>2</sup> *Morris v. Taylor*, 28 N. J. Eq. 131.

<sup>3</sup> *Tyler v. Simmons*, 6 Paige, 127.

<sup>4</sup> *Oliver v. Piatt*, 3 How. 834; *Anderson v. Henderson*, 124 Ill. 164. An acceptance of the report of a committee in chancery is a sufficient finding of the facts reported to support a decree. *Lavette v. Sage*, 29 Conn. 577.

<sup>5</sup> *Metsker v. Bonebrake*, 108 U. S. 66; *National Bank v. Sprague*, 28 N. J. Eq. 81; *Pool v. Gramling* (Ga.), 16 S. E. Rep. 52.

<sup>6</sup> *Girard Life Ins. Co. v. Cooper*, 51 Fed. Rep. 532.

§ 711. **Weight of the master's findings.**—The report of a master is merely advisory to the court, which it may accept and act upon in whole or in part, according to its own judgment as to the weight of the evidence.<sup>1</sup> In practice, however, it is well settled that "the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."<sup>2</sup> If, however, his

<sup>1</sup> *Boesch v. Graff*, 133 U. S. 697, 705; *Calvert v. Nickles*, 26 S. C. 304; s. c., 2 S. E. Rep. 116; *Medler v. Albuquerque Hotel & Co. (N. Mex.)*, 28 Pac. Rep. 551; *Wheeler v. Alderman (S. C.)*, 13 S. E. Rep. 678; *In re Thomas*, 35 Fed. Rep. 387, 389.

<sup>2</sup> *Tilghman v. Proctor*, 125 U. S. 186; *Camden v. Stuart*, 144 U. S. 104; s. c., 12 S. Ct. Rep. 585; *Metsker v. Bonebrake*, 108 U. S. 66; *Donnell v. Columbian Ins. Co.*, 2 Sumn. 866, 871; *Mason v. Crosby*, 3 Woodb. & M. 253, 269; *Callaghan v. Myers*, 128 U. S. 619; *Kimberly v. Arms*, 129 U. S. 512; *Central Trust Co. v. Wabash & C. Ry. Co.*, 31 Fed. Rep. 246; *Jaffrey v. Brown*, 29 Fed. Rep. 476; *Stanton v. Alabama & C. R. Co.*, 31 Fed. Rep. 585; *Cutting v. Florida Ry. Co.*, 43 Fed. Rep. 743, 747; *Welling v. La Bau*, 34 Fed. Rep. 40, 41; *Central Trust Co. v. Texas & C. R. Co.*, 32 Fed. Rep. 448; *Huntington v. Moore*, 1 N. Mex. 503; *Newcomb v. White (N. Mex.)*, 28 Pac. Rep. 671; *Blauvelt v. Woodworth*, 31 N. Y. 235; *Appeal of Perry (Pa.)*, 8 Atl. Rep. 450; *Appeal of Coxe*, 120 Pa. St. 96; s. c., 13 Atl. Rep. 727; *Borough of Sharpsburg's Appeal (Pa.)*, 10 Atl. Rep. 39; *Bugbee's Appeal*, 110 Pa. St. 381; *Stuart v. Hendricks*, 80 Va. 601; *Magarity v. Shipman*, 82 Va. 784; *Handy v. Scott*, 26 West Va. 710; *Fry v. Feamster (West Va.)*, 15 S. E. Rep. 253; *Roger v. O'Neal*, 33 West Va. 159; *Boyd v.*

*Gunnison*, 14 West Va. 1; *Graham v. Graham*, 21 West Va. 698; *McGuire v. Wright*, 18 West Va. 507; *Howe v. Russell*, 36 Me. 115; *Pierce v. Faunce*, 53 Me. 214; *McKinney v. Pierce*, 5 Ind. 422; *Anderson v. Henderson*, 124 Ill. 164; *Cary v. Herrin*, 62 Mo. 18; *McDougald v. Dougherty*, 11 Ga. 570; *White v. Hampton*, 10 Iowa, 238; *Sinnickson v. Bruere*, 9 N. J. Eq. 659; *Izard v. Bodine*, 9 N. J. Eq. 809; *Hanlenbeck v. Cronkright*, 28 N. J. Eq. 408; *Blauvelt v. Ackerman*, 28 N. J. Eq. 495; *Clark v. Condit*, 21 N. J. Eq. 323; *Holmes v. Holmes*, 18 N. J. Eq. 141; *Van Ness v. Van Ness*, 32 N. J. Eq. 669. In Massachusetts it is common to state the standard of weight as substantially that of the verdict of a jury. *Newell v. West*, 149 Mass. 520; *Dean v. Emerson*, 102 Mass. 480; *Richards v. Todd*, 127 Mass. 167; *Trow v. Berry*, 113 Mass. 189; *Paddock v. Commercial Ins. Co.*, 104 Mass. 521, 523; *Nichols v. Ela*, 124 Mass. 383; *Jones v. Keen*, 115 Mass. 171; *Whitney v. Leominster Sav. Bank*, 141 Mass. 35; *Drew v. Beard*, 107 Mass. 64; *McDonough v. O'Neil*, 113 Mass. 92; *Morse v. Hill*, 136 Mass. 60. But see *Holmes v. Holmes*, 18 N. J. Eq. 141. In Connecticut if there be no illegality in the mode of proceeding and no intentional wrong-doing, the finding of facts by a committee is beyond revision or correction equally with

deduction is from undisputed facts, or from matter uncontradicted and credible evidence, the controlling reason for the application of the foregoing rule is not present, because in such case he has no better facilities for reaching a correct conclusion than the court has in passing upon the exceptions to his report.<sup>1</sup>

§ 712. **Correction of report by the court.**—The court may correct a mere error in calculation in a master's report, although no exceptions have been filed, and without sending it back to the master.<sup>2</sup> So where the omission to reckon interest on certain items appeared to have been due to the master's oversight in a suit to redeem from a mortgage, the court made the necessary correction.<sup>3</sup> Where the decree directing an account to be taken was a final decree with no equity reserved, and when no further directions consequent upon the master's report were necessary, an error made by the master as to the value of the property was corrected by the court without referring the account back to the master for a restatement or setting down the cause for further hearing.<sup>4</sup>

the verdict of a jury. *Stannard v. Sperry*, 56 Conn. 541. See, also, *Ashmead v. Colby*, 26 Conn. 289, 313; *Goodman v. Jones*, 26 Conn. 267; *West v. Howard*, 20 Conn. 581; *Knapp v. White*, 28 Conn. 541. Under Vermont acts of 1878, No. 17, providing that a master's report, "unless good cause be shown, shall when accepted be conclusive of all questions of fact in issue," the master is substituted for the court, and his findings of fact, upon legal evidence, are conclusive. *Hathaway v. Hagan* (Vt.), 24 Atl. Rep. 131; *Bates v. Sabin* (Vt.), 24 Atl. Rep. 1013; *Thrall v. Chittenden*, 31 Vt. 186; *McDaniels v. Harbour*, 43 Vt. 460; *Rowan v. Bank*, 45 Vt. 195; *Merrill v. Railroad Co.*, 54 Vt. 200; *Waterman v. Buck*, 58 Vt. 512. Matters of account when reported upon by the master and adopted by the chancellor are

treated on appeal as conclusively settled, unless it clearly appears that the report is based upon an error of law, or is the result of a clear mistake. *Turley v. Turley*, 85 Tenn. 251, 256. See, also, *Von Vranker v. Eastman*, 7 Met. 163.

<sup>1</sup> *McConomy v. Reed* (Pa.), 25 Atl. Rep. 176.

<sup>2</sup> *Utica Ins. Co. v. Lynch*, 2 Barb. Cl. 573; *Bogert v. Furman*, 10 Paige, 466.

<sup>3</sup> *Crossman v. Card*, 143 Mass. 152. Where interest has accrued after the filing of the report, the court has the undeniable right to refer the cause to the master to determine the amount, or the court may, if it thinks proper, compute the interest without a reference. *Goodwin v. Bishop* (Ill.), 34 N. E. Rep. 47.

<sup>4</sup> *Huston v. Cassidy*, 14 N. J. Eq. 320. For similar cases see *Carpenter*



§ 713. **Re-reference.**—If the facts are imperfectly stated in the report so that no judgment can be formed as to the proper conclusion,<sup>1</sup> or if the existing evidence is unsatisfactory, but it is possible that other evidence exists, which in consequence of a favorable finding has not been adduced,<sup>2</sup> or if the nature of the matter contested or the frame of the exceptions is such that their allowance shows a necessity for further investigation,<sup>3</sup> or if the report is based on erroneous views of the master on important matters,<sup>4</sup> it may be referred back to the master to review his report, continuing in the meantime the reservation of further directions, and either allowing the exceptions or making no order thereon.<sup>5</sup>

*u. Schermerhorn*, 2 Barb. Ch. 315; *Morris v. Taylor*, 23 N. J. Eq. 132; *Safford v. Safford*, 7 Paige, 259.

<sup>1</sup> *Adams' Equity* (7th Am. ed.), 386; *Pinneo v. Goodspeed*, 120 Ill. 524; s. c., 12 N. E. Rep. 196; *Waterman v. Buck*, 63 Vt. 544; s. c., 22 Atl. Rep. 15. Where the master expresses no opinion on a material point, not supposing it was included in the reference, if either party has further evidence and desires a further reference it will be ordered. *Dutch Church v. Smock*, 1 N. J. Eq. 148. The want of a statement in the master's report that the same damages were included in two suits is no ground for setting aside and recommitting the report, the fact being conceded. *Jennings v. Dolan*, 29 Fed. Rep. 861. Small errors in the master's statement of an account involving a large sum were held not sufficient to require him to restate the account, even though exceptions to his report were sustained on other grounds. *Taylor v. Robertson*, 27 Fed. Rep. 537.

<sup>2</sup> *Adams' Equity* (7th Am. ed.), 386.

<sup>3</sup> *Adams' Equity* (7th Am. ed.), 386.

<sup>4</sup> *Blauvelt v. Ackerman*, 20 N. J. Eq. 141.

<sup>5</sup> *Adams' Equity* (7th Am. ed.), 387, Where a master, after a full hearing

of the proofs, refuses to pass on the merits of the controversy because of an alleged fatal variance between pleading and proof, the trial court, on a hearing of the exceptions to his report two years after the close of the testimony, after reversing his ruling as to the variance, need not recommit the case to him to find the facts, but may itself examine the testimony as reported by him, and find the facts therefrom. *Gaines v. Brockert* (Pa.), 19 Atl. Rep. 958, citing *Phillips' Appeal*, 68 Pa. St. 180. Where the correction of the report of a master can be made from facts appearing in the case, aside from the evidence before the master, it should be made without sending the report back. *Witters v. Sowles*, 43 Fed. Rep. 405; *Parks v. Booth*, 103 U. S. 96. A report may be accepted in part and recommitted for the residue. *Calender v. Colegrove*, 17 Conn. 2. Although a master's report may be inaccurate in some statements of fact, or may omit some, unless it appears that the defects are such as to work some material prejudice to the party excepting, whereby an unjust result is reached, a re-reference or vacation of the report will not be directed. *McElroy v. Swope*, 47 Fed. Rep. 380.

§ 714. **Re-reference discretionary.**—"In respect to such matters as the recomittal of accounts or reference back to a master the chancellor exercises a very large discretion, and is not to be put in error in his action upon such motions, except upon very clear showing of merits and in the absence of negligence."<sup>1</sup>

§ 715. **Scope of re-reference — Authority of master.**— On a re-reference the master may receive additional evidence,<sup>2</sup> and the court may in its order allow additional proofs to be taken, notwithstanding a restriction in the decree as to time.<sup>3</sup> Where a report is sent back to be amended it is not open for review generally by the master, unless the court expressly authorizes him to review it generally, or the nature and scope of the exceptions allowed necessarily embrace the whole subject-matter of the account originally taken by the master.<sup>4</sup> If

In a suit for the price of land the court rightly declined to refer the cause back to the master to enable defendant to prove part payment where he had not set up such defense in his answer. *Lemon v. Rogge* (Minn.), 11 So. Rep. 470. If an account has been stated by a master, the court may restate the account without sending it back to the master, where the account as restated is only slightly changed. *Whittemore v. Fisher*, 183 Ill. 243; s. c., 24 N. E. Rep. 686. Where the master reported the amount due upon several mortgages and also their order of priority, and upon exceptions taken to the report the order of priority was changed, a final decree was taken at once, without a reference back to the master. *Chance v. Teeple*, 4 N. J. Eq. 178.

<sup>1</sup> *Jackson, C. J.*, in *Mosher v. Joyce* (C. C. A.), 51 Fed. Rep. 441, 444; *Hubbard v. Camperdown Mills*, 26 S. C. 581, 588; *Symmes v. Symmes*, 18 S. C. 601; *Caulfield v. County of Charleston*, 19 S. C. 600. In the case first cited it was further said that "where litigants have an opportunity of pre-

senting their cases fully, and elect to proceed on a certain theory as to their rights, which is subsequently not sustained, and then move to open the cause for proof upon another theory, some good showing should be presented to support such motion."

<sup>2</sup> *Adams' Equity* (7th Am. ed.), 887.

<sup>3</sup> *Worthington v. Hiss*, 70 Md. 172; s. c., 16 Atl. Rep. 584, where it was considered to be "the plain duty of a court of equity to allow further proof to come in at any time during the progress of a cause when in its judgment the taking of such proof will subserve the ends of justice." An order being made to re-refer an account stated and filed by a master "for the purposes and with the powers mentioned in the original order of reference, to state an account between the parties with particularity, and that the said master have power to take further evidence," it was held that such order gave authority to the parties to introduce such evidence as they respectively deemed requisite. *Van Ness v. Van Ness*, 32 N. J. Eq. 729.

<sup>4</sup> *Clark v. Willoughby*, 1 Barb. Ch.

the re-reference be accompanied by an allowance of the exception the master can come to no conclusion inconsistent with the terms of the exception.<sup>1</sup>

§ 716. *Costs of exceptions.*—The general rule is that each party recovers costs of those exceptions on which he succeeds and pays costs on those upon which he fails.<sup>2</sup> Where the costs on each side on exceptions to a master's report would be nearly equal, the usual practice of the court is to give no costs to either party.<sup>3</sup> Where a master's report is confirmed by the court awarding only nominal damages for the infringement of a patent, the costs of the reference, including the master's fees, and the costs of the exceptions and hearing thereon, should be taxed against the complainant.<sup>4</sup>

68. Where, on appeal, a cause is remanded for a restatement of an account of rents and profits by a master because the former statement was not sufficiently specific or had not been prepared with reference to the legal rights of the parties affected by it, the court below has the right to adopt any legal method for estimating the rents and profits, whether according to the reasonable value or the actual receipts, and is not bound to adopt the same basis as was adopted in the former statement of the account in estimating the rental value of the property. *Pinneo v.*

*Goodspeed*, 120 Ill. 524; s. c., 12 N. E. Rep. 196.

<sup>1</sup> *Adams' Equity* (7th Am. ed.), 887.

<sup>2</sup> *Hunn v. Norton*, Hopk. Ch. 844; *Norton v. Whiting*, 1 Paige, 578; *Methodist E. Church v. Jaques*, 8 Johns. Ch. 77; *United States Equity Rule* 84. A party who succeeds in a substantial particular on exceptions to a master's report is, as a general rule, entitled to his costs in such proceeding. *Sanford v. Clarke*, 88 N. J. Eq. 265.

<sup>3</sup> *Richards v. Barlow*, 1 Paige, 823.

<sup>4</sup> *Everest v. Buffalo L. Oil Co.*, 81 Fed. Rep. 742.

## CHAPTER XXII.

### RECEIVERS.

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| <p>§ 717. Definition of receiver.<br/>718. Ancillary receivers.<br/>719. Property over which a receiver may be appointed.<br/>720. Appointment of receivers discretionary — Appeals.<br/>721. Jurisdiction to appoint a receiver — Necessity of suit pending.<br/>722. Conflicting appointments — Comity.<br/>723. Mode of appointment — Reference to a master.<br/>724. At what time a receiver may be appointed.<br/>725. Eligibility of receivers.<br/>726. Security of receivers.<br/>727. The same subject continued — Liability of sureties.<br/>728. Who may apply for a receiver.<br/>729. Requisites of the application — Motion and affidavit.<br/>730. Notice of application for appointment.<br/>731. Receivers' certificates, when authorized.<br/>732. Orders authorizing receivers' certificates.<br/>733. Negotiability of receivers' certificates.</p> | <p>§ 734. Priorities in railroad mortgage foreclosures.<br/>735. The same subject continued — "Six months' rule."<br/>736. Advice to receivers.<br/>737. Protection to receivers.<br/>738. Compensation of receivers.<br/>739. Compensation of railway receivers.<br/>740. Extra compensation.<br/>741. Appeals from allowances for services.<br/>742. Suits by receivers — Leave of court.<br/>743. The same subject continued — Parties and pleading.<br/>744. Suits against receivers — Leave of court.<br/>745. Application for leave to sue receivers.<br/>746. Leave of court to make a receiver a party.<br/>747. Suits by receivers in foreign jurisdictions — Comity.<br/>748. Receivers' accounts.<br/>749. Removal of receivers.<br/>750. Discharge of receivers.<br/>751. Effect of discharge.<br/>752. Costs of receivership.</p> |
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§ 717. Definition of receiver.— A receiver is a ministerial officer of a court of chancery appointed as an indifferent person between the parties to a suit to take possession of and preserve, *pendente lite*, the fund or property in litigation when it does not seem equitable to the court that either party should

have possession or control of it.<sup>1</sup> He is appointed for the benefit of the interested party who makes the application and for the benefit of all others who may eventually be found to have an interest in the property or its proceeds; and the object of his appointment is to preserve the subject-matter of the litigation, or its rents and profits, from waste, loss or destruction.<sup>2</sup> The appointment does not of itself affect the title to the property committed to the charge of the receiver;<sup>3</sup> nor does it determine any of the rights involved in the controversy.<sup>4</sup> The receiver is regarded as the creature or officer of the court, having only such powers as are expressly conferred upon him by the order of appointment, or such as are conferred upon him by the established rules and usages of a court of chancery.<sup>5</sup>

§ 718. **Ancillary receivers.**—An ancillary receiver is a receiver appointed in aid of a receiver appointed by another court.<sup>6</sup> Where a receiver has been appointed by a State court, a court of another State may, when necessary, appoint an ancillary receiver.<sup>7</sup> A federal circuit court may appoint a receiver as ancillary to one who has been appointed by another circuit court.<sup>8</sup>

<sup>1</sup> Beach on Receivers, § 1; Wyatt's 66 N. C. 252; Skinner v. Maxwell, 66 Prac. Reg., 385; Chautauqua Co. N. C. 45; Coburn v. Ames, 57 Cal. Bank v. White, 6 Barb. 584; Waters 201; Hunt v. Wolfe, 2 Daly (N. Y.), v. Carroll, 9 Yerg. 102; Booth v. 313.  
Clark, 17 How. 322; Devendorf v. Dickinson, 21 How. Pr. 275; Baker v. Adm'r of Backus, 32 Ill. 79.

<sup>2</sup> Gibson's Suits in Chancery, § 842; 1 Barbour's Ch. Pr. 658.

<sup>3</sup> Ellis v. Boston &c. R. Co., 107 Mass. 1; *Ex parte Dunn*, 8 S. C. 207; *In re Colvin*, 8 Md. Ch. Dec. 278; Union Bank v. Kansas City Bank, 136 U. S. 223, 236.

<sup>4</sup> Skip v. Harwood, 8 Atk. 569; Beach on Receivers, § 1; Gibson's Suits in Chancery, § 842.

<sup>5</sup> Beach on Receivers, § 2; Booth v. Clark, 17 How. 322; Hooper v. Winston, 24 Ill. 353; Battle v. Davis,

66 N. C. 252; Skinner v. Maxwell, 66 N. C. 45; Coburn v. Ames, 57 Cal. 201; Hunt v. Wolfe, 2 Daly (N. Y.), 313.

<sup>6</sup> 1 Foster's Federal Practice (2d ed.), § 242, citing Jennings v. Phila. &c. R. Co., 23 Fed. Rep. 569; Williams v. Hintermeister, 26 Fed. Rep. 889.

<sup>7</sup> Williams v. Hintermeister (Pa., 1886), 26 Fed. Rep. 889. See, also, Bidlack v. Mason, 26 N. J. Eq. 230.

<sup>8</sup> Jennings v. Phila. &c. R. Co., 23 Fed. Rep. 569; Central Trust Co. v. Wabash &c. R. Co., 29 Fed. Rep. 618.

"In Mercantile Trust Co. v. Kanawha &c. R. Co., 39 Fed. Rep. 337, Justice Harlan and Judge Jackson held in a formal opinion that the circuit courts of the United States cannot take jurisdiction of a bill whose only purpose

**§ 719. Property over which a receiver may be appointed.**

"The property a receiver is most commonly appointed to take charge of is:—(1) property levied on by attachment or execution and liable to perish or deteriorate pending the suit; (2) goods, wares and merchandise involved in the litigation; (3) judgments, notes, accounts and other claims attached or impounded by garnishment; (4) partnership property of all kinds; (5) corporation property of all kinds; (6) real estate belonging to tenants in common, or incumbered by liens belonging to other parties and by them sought to be enforced; (7) assets of a deceased person; (8) trust property of all kinds; (9) proceeds of waste committed on real estate; (10) rents and profits of real estate, as of coal, iron or other mines, or of quarries, or of turnpikes or railroads. Indeed it may be stated, generally, that a receiver may be appointed of any kind of property, or of the proceeds of any kind of property, real, personal or mixed, legal or equitable, that may be disposed of by the decree of the court in the cause."<sup>1</sup>

**§ 720. Appointment of receivers discretionary — Appeals.**— It is a well-settled rule that the appointment of a receiver is discretionary with the court.<sup>2</sup> The power to appoint

is an ancillary receivership, but in other districts such bills have been frequently entertained and acted upon generally, if not always, in *ex parte* proceedings, and without argument. The same has been done *ex parte* on several occasions in this court. We will at present follow this practice, stating, however, that this is without prejudice to a full consideration of the question if hereafter a motion is made to dissolve or annul the order." *Platt v. Philadelphia*, 54 Fed. Rep. 569 (First Circuit, *per curiam*, Putnam, C. J., and Nelson, D. J.).

<sup>1</sup> *Gibson's Suits in Chancery*, § 844.

<sup>2</sup> *Farmers' Loan & Trust Co. v. Kansas City &c. R. Co.*, 58 Fed. Rep. 183, to which is appended an instructive note by Morris M. Cohn, Esq., of Little Rock (S. C., pp. 192-

196). Citing on this point, *Verplank v. Caines*, 1 Johns. Ch. 57; *Chicago &c. Co. v. United States &c. Co.*, 57 Pa. St. 88; *Hamburgh Mfg. Co. v. Edsall*, 8 N. J. Eq. 141; *Leavitt v. Yates*, 4 Edw. Ch. 162; *Smith v. Railroad Co.*, 12 Ont. App. 288; *Owen v. Homan*, 8 Macn. & G. 378; s. c., 4 H. L. Cas. 997; *Hanna v. Hanna*, 89 N. C. 68; *Railroad Co. v. Louther*, 2 Wall. 510; *Overton v. Railroad Co.*, 10 Fed. Rep. 866; *Williamson v. Railroad Co.*, 1 Biss. 198; *Sage v. Railroad Co.*, 18 Fed. Rep. 574; *Mercantile Trust Co. v. Missouri &c. Ry. Co.*, 86 Fed. Rep. 221; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46, 49; *Farmers' L. & T. Co. v. Chicago &c. Ry. Co.*, 27 Fed. Rep. 146; *Beecher v. Bininger*, 7 Blatchf. 170; *Vose v. Reed*, 1 Woods, 647; *Pullan v. Railroad Co.*, 4 Biss. 35, 47; *Morrison v. Buckner*,

a receiver in a suit for the foreclosure of a railroad mortgage is to be exercised sparingly and with great caution.<sup>1</sup> Although a railroad mortgage covers the income of the property and expressly provides that the mortgagee shall be entitled to have a receiver appointed if it becomes necessary to resort to the courts to enforce the obligations of the mortgagor corporation, the appointment of a receiver is not thereby withdrawn from the discretion of the chancellor.<sup>2</sup> It has been held in the federal courts that the exercise of the discretion to appoint a receiver is subject to review on appeal.<sup>3</sup> In some of the States appeals are expressly allowed<sup>4</sup> or disal-

Hemp. 442. See, also, *Buckeye Engine Co. v. Donan Brewing Co.*, 47 Fed. Rep. 6; *Sage v. Memphis & Little Rock R. Co.*, 125 U. S. 361; *Watkins v. National Bank (Kan.)*, 82 Pac. Rep. 914; *Mills v. Webb (Ga.)*, 15 S. E. Rep. 685; *American Biscuit Mfg. Co. v. Klotz*, 44 Fed. Rep. 721, 725; *Mays v. Rose*, Freeman's Ch. (Miss.) 703, 718, where Chancellor Buckner lays down the following rules which should govern the exercise of discretion: — "1st. That the power of appointment is a delicate one and to be exercised with great circumspection. 2d. That it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property. 3d. That there is no case in which the court appoints a receiver merely because the measure can do no harm. 4th. That 'fraud or imminent danger, if the immediate possession should not be taken by the court, must be clearly proved.' And 5th. That unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application." "The question of the appointment of a receiver in any case is left to the sound discretion of the court, and such appointment is only made to preserve

the property and assets for the benefit of all parties in interest. Sometimes it is necessary to collect the debts due; sometimes to continue the business. This is especially so in railroad cases, manufacturing establishments and other cases in which an immediate cessation of the business would work an injury, such as the completion and gathering of crops; and in other cases where real estate is to be leased out, rents collected and taxes paid." *Robinson v. Taylor*, 42 Fed. Rep. 803, 811.

<sup>1</sup> *Farmers' L. & T. Co. v. Kansas City & C. R. Co.*, 58 Fed. Rep. 182, 184; *Railroad Co. v. Howard*, 131 U. S., Append. LXXXI; *Fosdick v. Schall*, 99 U. S. 235, 253; *Sage v. Railroad Co.*, 125 U. S. 361, 376.

<sup>2</sup> *Pennsylvania Co. v. Jacksonville & C. Ry. Co.*, 55 Fed. Rep. 181; citing *Pullan v. Railroad Co.*, 4 Biss. 35; *Williamson v. Railroad Co.*, 1 Biss. 198; *Tysen v. Railroad Co.*, 8 Biss. 247; *Union Trust Co. v. St. Louis & C. R. Co.*, 4 Dill. 114.

<sup>3</sup> *Winthrop Iron Co. v. Meeker*, 109 U. S. 180; *Tysen v. Wabash & C. R. Co.*, 8 Biss. 247.

<sup>4</sup> *R. S. Ind. (1881)*, § 1231; *Dale v. Kent*, 58 Ind. 584; *Buchanan v. Berkshire L. Ins. Co.*, 96 Ind. 510; *Wabash R. Co. v. Dykeman (Ind.)*, 82 N. E. Rep. 823. See, also, *McClellan's Di-*

lowed<sup>1</sup> by statute. In States where the right of appeal is confined to final decrees, an order appointing a receiver is not generally appealable<sup>2</sup> unless it involves a substantial decision of the merits of the case,<sup>3</sup> or unless some rule of law or well-established principle of equity has been plainly abused.<sup>4</sup>

**§ 721. Jurisdiction to appoint a receiver — Necessity of suit pending.**—Except in the case of lunatics and infants whose position as wards of the court gives them the right to apply by petition, or in cases similarly situated,<sup>5</sup> it is a prerequisite to the power of a judge to act upon the application for a receiver that there should be a case pending in which the receiver is to be appointed.<sup>6</sup> Thus it has been held that

gest of Laws of Florida, p. 167, ch. 17, § 2; *Grant v. Webb*, 21 Minn. 89. Where a receiver was appointed in the evening, and on the next morning, before the order of appointment was read in open court by the clerk, defendant appeared by attorney and objected to the order, which objection was overruled, defendant may have the order reviewed on appeal, though the record shows that no exception was taking to the ruling of the court appointing a receiver at the time it was made. *Wabash R. Co. v. Dykeman (Ind.)*, 82 N. E. Rep. 828.

<sup>1</sup> Cal. Code Civil Proc., § 939; *French Bank Case*, 58 Cal. 495; *Emmerie v. Alvarado*, 64 Cal. 529.

<sup>2</sup> *Meadow Valley Mining Co. v. Dodds*, 6 Nev. 261; *Coates v. Cunningham*, 80 Ill. 467; *Hottenstein v. Conrad*, 5 Kan. 249; *Kansas Rolling Mill Co. v. Atchison & Co. R. Co.*, 81 Kan. 90; *Duncan v. Campau*, 15 Mich. 415; *Brown v. Vandermeulen*, 41 Mich. 418; *Beecher v. M. & P. R. M. Co.*, 4 Mich. 807; *Holden's Adm'r v. McMakin*, Par. Eq. Cas. 270; *Eaton & Co. R. Co. v. Varnum*, 10 Ohio St. 623; *Johnson v. Hanner*, 2 Lea, 8.

<sup>3</sup> *Lewis v. Campau*, 14 Mich. 458; *Barry v. Briggs*, 23 Mich. 201; *Knight v. Nash*, 22 Minn. 452. In New York,

where the court at special term has power and jurisdiction on the facts appearing to appoint a receiver, its order making such appointment is in the exercise of its discretion, and not reviewable in the court of appeals. *Dawson v. Parsons (N. Y.)*, 88 N. E. Rep. 482; *Connelly v. Kretz*, 78 N. Y. 620. But an order of the special term of the Supreme Court is reviewable by the general term. *Dollard v. Taylor*, 88 N. Y. Super. Ct. 496. See, also, in New Jersey, *Journey v. Brown*, 26 N. J. Law, 111.

<sup>4</sup> *Beach on Receivers*, § 40; *Wilson v. Davis*, 1 Mont. 98; *Wood v. Brewer*, 9 Ind. 86.

<sup>5</sup> *Baker v. Backus*, 82 Ill. 96; *Leddell's Ex'r v. Starr*, 19 N. J. Eq. 159; *Ex parte Radcliffe*, 1 J. & W. 639; *Anon.*, 1 Atk. 578; *Ex parte Warren*, 10 Ves. 622; *Ex parte Whitfield*, 2 Atk. 815; 2 *Daniell's Ch. Pr.* (5th ed.) 1354; *In re Leeming*, 20 Law J. Ch. 551; *In re Gascayne*, 20 Law J. Ch. 551.

<sup>6</sup> *Pressley v. Harrison*, 102 Ind. 14; *Leddell's Ex'r v. Starr*, 19 N. J. Eq. 159; *Anon.*, 1 Atk. 578; *Crowder v. Moores*, 52 Ala. 221; *Jones v. Bank of Leadville*, 10 Colo. 478. The court or judge at chambers has no power or jurisdiction to appoint a receiver



partners cannot, without any suit pending between them, obtain the appointment of a receiver for their property by their mutual request therefor, one putting his request in the form of a complaint against the other, and the latter his consent in the form of an answer to such complaint.<sup>1</sup> But such an appointment could not be attacked collaterally.<sup>2</sup> There may be a pending action so as to authorize the appointment of a receiver although the notice of service is defective.<sup>3</sup>

**§ 722. Conflicting appointments — Comity.**— Neither law, equity nor comity require that either a State or federal court shall refrain from appointing a receiver where it has jurisdiction of the parties and where such action is otherwise proper, merely because there is pending in the other court a bill for

when there is no action pending. *Franklin v. Meyer*, 86 Ark. 96, 107, 109; *Guy v. Doak*, 47 Kan. 286, where *Simpson, C.*, said:—"We have been unable to find a single reported case anywhere that sustains a court in the appointment of a receiver before an action is pending; but on the contrary the text-books and reports are all against the existence of such power." *Hardy v. McClellan*, 58 Miss. 507; *Jones v. Schall*, 45 Mich. 379; *Merchants' &c. Nat. Bank v. Circuit Judge*, 48 Mich. 292. See, also, *In re Macaulay*, 27 Hun, 576. *Cf. Grimston v. Turner*, 18 Week. Rep. 725. In *Pressley v. Harrison*, 102 Ind. 14, the court said:—"As in the motion for appointment nothing is before the judge for determination except the application, and as to such application no pleadings are proper, it may well be doubted whether in any case jurisdiction to make such appointment could be acquired by a judge at chambers by the voluntary appearance of the defendant to such motion, where process had issued and no appearance was entered in the cause." In *Gold Hunter Min. & Smelt. Co. v. Holleman* (Idaho), 27 Pac. Rep. 413, it was held that a re-

ceiver cannot be appointed prior to the commencement of an action, which is not until a complaint is placed in the hands of the clerk or deposited in his office with directions to file the same.

<sup>1</sup> *Pressley v. Harrison*, 102 Ind. 14. Where a receiver of mortgaged chattels is appointed before an intended action of foreclosure is commenced, the appointment is void; but where the intended action is afterwards commenced, and defendant afterwards makes a voluntary appearance, and presents a motion to remove the receiver on grounds other than the non-pendency of the action at the time of the appointment, and the court or judge overrules the motion, the person originally appointed as receiver will then become such, and be such from that time on. *Guy v. Doak*, 47 Kan. 286. The appointment of a receiver in Illinois by a judge of the state court in vacation is unauthorized by law; but if it is afterwards confirmed by the court in term, it will be deemed to have been made by the court itself. *Hervey v. Ill. Mid. Ry. Co.*, 28 Fed. Rep. 169.

<sup>2</sup> *Pressley v. Lamb*, 105 Ind. 171.

<sup>3</sup> *Hellebush v. Blake*, 119 Ind. 349.

foreclosure of the property affected.<sup>1</sup> And where a receiver appointed by one court actually takes possession of the property, the control will not be surrendered to a receiver subsequently appointed by the other, although the suit in the latter court was commenced before that in the former.<sup>2</sup>

§ 723. Mode of appointment — Reference to a master.—

By the former practice in the English court of chancery, which was followed by the New York court of chancery, the usual course was for the chancellor to enter an order referring the matter to a master to make proper investigations and report a proper person to be appointed receiver, or to make an appointment. Where the master is directed *to appoint* a receiver and take from him the requisite security, no order for the confirmation of the appointment is necessary; and the receiver upon filing the master's report, and the bond taken by such master, may immediately enter upon the duties of his office.<sup>3</sup> But where there is an order of the court referring it to a master to report a proper person *to be* appointed a receiver of the property of a defendant, or of a corporation, or the committee of a lunatic, etc., and to approve of the sureties to be given by such receiver or committee, the appointment is not complete until he is confirmed by the special order of the court.<sup>4</sup> Where the master appoints a receiver, if either party is dissatisfied with the appointment, the proper course is to make a special application to the court for an order that the master review his decision. But the court will

<sup>1</sup> *Bank v. Trustees*, 68 Ga. 552; *East Tenn. &c. R. Co. v. Atlanta &c. R. Co.*, 49 Fed. Rep. 608, 610.

<sup>2</sup> *East Tenn. &c. R. Co. v. Atlanta &c. R. Co.*, 49 Fed. Rep. 608. "Service of process gives jurisdiction over the person,—seizure gives jurisdiction over the property; and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction." Justice Bradley in *Wilmer v. Railroad Co.*, 2 Woods, 426; and in addition to many authorities there cited, see *Barton v. Keyes*, 1 Flippin, 61; *Levi v. Insurance Co.*, 1 Fed. Rep. 206; *Walker v. Flint*, 7

Fed. Rep. 437; *Erwin v. Lowry*, 7 How. 172; *Griswold v. Railroad Co.*, 9 Fed. Rep. 797; *Covell v. Heyman*, 111 U. S. 176; s. c., 4 S. Ct. Rep. 355; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294; s. c., 5 S. Ct. Rep. 185. In cases of conflicting appointments and inquiry into priority, the court will, if necessary, take into consideration fractions of a day. *Beach on Receivers*, § 282.

<sup>3</sup> *In re Eagle Iron Works*, 8 Paige, 885.

<sup>4</sup> *In re Eagle Iron Works*, 8 Paige, 885.

not set aside the appointment made by the master unless the person selected by him is legally disqualified, or his situation is such as to induce a belief that the interests of the property will not be properly attended to by him.<sup>1</sup> The practice of referring the appointment of a receiver to a master is no longer pursued in the United States, except in occasional instances, either in the State or federal courts.<sup>2</sup>

§ 724. At what time a receiver may be appointed.— A receiver may be appointed at any stage of the proceedings after suit is begun.<sup>3</sup> If the emergency shown is such as to render it essential to justice that a receiver should be immediately appointed it may be done before answer.<sup>4</sup> In such case the defendant may be heard by affidavit in opposition to the motion.<sup>5</sup> A receiver may be appointed when a demurrer to the bill is pending and undetermined,<sup>6</sup> or while a plea to an amended bill is pending and undisposed of,<sup>7</sup> or pending an ap-

<sup>1</sup> *In re Eagle Iron Works*, 8 Paige, 385.

<sup>2</sup> *Beach on Receivers*, § 105; 1 *Foster's Federal Practice* (3d ed.), § 254, citing *Miltenerberger v. Logansport Ry. Co.*, 106 U. S. 286; *Buck v. Piedmont & Arlington L. Ina. Co.*, 4 Fed. Rep. 849; *Frank v. Denver & C. Ry. Co.*, 23 Fed. Rep. 757; *Taylor v. Philadelphia & C. Ry. Co.*, 7 Fed. Rep. 379; *Cowdrey v. Railroad Co.*, 1 Woods, 381, 341. A motion to vacate an order of the federal circuit court appointing a receiver, and to discharge the receiver, may be heard at chambers either by the circuit or the district judge. *Walters v. Anglo-American M. & T. Co.*, 50 Fed. Rep. 316. See, also, § 16, *supra*.

<sup>3</sup> *Henshaw v. Wells*, 9 Humph. (Tenn.) 568.

<sup>4</sup> *Johns v. Johns*, 23 Ga. 31; *Weis v. Goetter*, 72 Ala. 259; *Blondheim v. Moore*, 11 Md. 365; *Clark v. Ridgely*, 1 Md. Ch. 70; *Whitehead v. Wooten*, 43 Miss. 523; *Probasco v. Probasco*, 30 N. J. Eq. 108; *Duckworth v. Traf-ford*, 18 Ves. 283; *Jones v. Dougherty*, v. Ga. 273. The grounds must be

very strong and special. *Latham v. Chaffee*, 7 Fed. Rep. 525; *Beecher v. Bininger*, 7 Blatch. 170; *West v. Sevan*, 8 Edw. Ch. 420; *Micou v. Moses*, 73 Ala. 439. A receiver will not be appointed on the coming in of the answer when such appointment is the principal question in the case, and is required, if at all, as a means for enforcing the decree, and not for a merely ancillary purpose connected with the temporary incidents of the suit, but action will be deferred till the hearing. *Union Mut. L. Ina. Co. v. Union Mills Plaster Co.*, 37 Fed. Rep. 287. The court will not upon bill and affidavits before answer upon the prayer of a minority of stockholders in a corporation, in opposition to the wishes of the majority, appoint a receiver and practically put an end to the existence of the corporation. *Ranger v. Champion Cotton Press Co.*, 52 Fed. Rep. 609.

<sup>5</sup> *Kean v. Colt*, 5 N. J. Eq. 365; *Micou v. Moses*, 73 Ala. 439.

<sup>6</sup> *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 337.

<sup>7</sup> *Thompson v. Selby*, 13 Sim. 100.

peal,<sup>1</sup> or after final decree.<sup>2</sup> An application for the appointment of a receiver which has been allowed to sleep for six years will be denied although some testimony has been taken in the meantime.<sup>3</sup>

§ 725. *Eligibility of receivers.*—The general rule undoubtedly is that a receiver ought to be an indifferent person, and in the full sense of the term the “representative of the court.” His past relations, the influences that secured his appointment, his sympathies from whatever cause, must not be such as to predispose him either way.<sup>4</sup> But the selection of a proper person is very much a matter within the discretion of the court,<sup>5</sup> and hence will very rarely be interfered with by an appellate court.<sup>6</sup> The court will not ordinarily appoint one who who is a party,<sup>7</sup> except, perhaps, in partnership suits or under

<sup>1</sup> *Beach on Receivers*, § 114; *Merrill v. Elam*, 2 Coop. Ch. (Tenn.) 518; *Penn. Mut. L. Ins. Co. v. Semple*, 88 N. J. Eq. 814; *Hutton v. Lockridge*, 27 West Va. 428.

<sup>2</sup> *Beach on Receivers*, § 115; *Beard v. Arbuckle*, 19 West Va. 145; *Brinkman v. Ritzinger*, 83 Ind. 858; *Schreiber v. Carey*, 48 Wis. 208; *Thomas v. Davies*, 11 Beav. 29; *Wright v. Vernon*, 8 Drew. 112. After a decree in an action to subject property fraudulently conveyed, a receiver may be appointed, though not prayed in the bill, where the circumstances justify it. *Shannon v. Hanks*, 88 Va. 888; s. c., 13 S. E. Rep. 487.

<sup>3</sup> *Hood v. First Nat. Bank*, 29 Fed. Rep. 55.

<sup>4</sup> *Wood v. Oregon Development Co.*, 55 Fed. Rep. 901, where a receiver appointed at chambers, the court being ignorant of the fact that he was the nominee of one of two hostile parties bitterly opposed to each other, was subsequently removed on motion; *Shannon v. Hanks* (Va.), 13 S. E. Rep. 487. The court may appoint the person recommended in the bill (*Johns v. Johns*, 28 Ga. 81), and is

disposed to favor a person whose selection is agreed upon by the parties. *Wood v. Oregon Development Co.*, *supra*; *Beach on Receivers*, §§ 25, 26.

<sup>5</sup> *Shannon v. Hanks* (Va.), 13 S. E. Rep. 487; *Lupton v. Stephenson*, 11 Ir. Eq. 484; *Williamson v. Wilson*, 1 Bland, 418; *In re Empire City Bank*, 10 How. Pr. 498.

<sup>6</sup> *Shannon v. Hanks*, 88 Va. 888; s. c., 13 S. E. Rep. 487. In *Cookes v. Cookes*, 2 De G., J. & S. 526, Lord Justice Knight-Bruce said that to induce an appellate court to act against the decision of the lower judge in the selection of a receiver it is necessary to find some overwhelming objection in point of propriety of choice or some objection fatal in principle. *Jacoby v. Kiesling*, 87 Ga. 28; s. c., 18 S. E. Rep. 161. But where the impropriety is flagrant the choice of the lower court will be repudiated. *Perry v. Oriental Hotel Co.*, L. R. 5 Ch. App. 420; *Lupton v. Stephenson*, 11 Ir. Eq. 484.

<sup>7</sup> *Finance Co. v. Charleston & Co. R. Co.*, 45 Fed. Rep. 436. Special circumstances may justify the appointment. *Blakeney v. Dufaur*, 15 Beav. 40; *Robinson v. Taylor*, 42 Fed. Rep.

special circumstances; or a solicitor in the cause;<sup>1</sup> or the partner of a solicitor;<sup>2</sup> or a near relative of one of the parties;<sup>3</sup> or stockholders or officers of an insolvent corporation party;<sup>4</sup> nor a master in chancery who may be called upon to pass upon the receiver's accounts;<sup>5</sup> or a trustee of the property;<sup>6</sup> or the next friend of an infant;<sup>7</sup> or the son of a next friend.<sup>8</sup> An assignee under a general assignment for the benefit of creditors which has been successfully assailed upon the ground of fraud will not be appointed receiver in pursuance of the decree in such proceedings.<sup>9</sup> Nor will the court appoint as receiver of an assigned estate a preferred creditor, whatever his character may be, the preference of whose debt it is claimed will render the assignment void; such preferred creditor being

808, 812; *Shainwald v. Lewis*, 8 Fed. Rep. 878. And see, for a relaxation of the rule in partnership suits, *Jeffery v. Smith*, 1 Jac. & W. 297; *Wilson v. Greenwood*, 1 Swanst. 488. But the appointment of a partner is not imperative. *Bliley v. Taylor* (Ga.), 18 S. E. Rep. 288.

<sup>1</sup> *Finance Co. v. Charleston & C. R. Co.*, 45 Fed. Rep. 486; *Garland v. Garland*, 2 Ves. Jr. 187; *Baker v. Backus*, 32 Ill. 79. Cf. *Wilson v. Poe*, 1 Hogan, 822. But where the court appointed two receivers, the mere fact that one of them was attorney for complainant was not deemed an abuse of discretion where the other was attorney for defendant. *Shannon v. Hanks*, 88 Va. 838; s. c. 18 S. E. Rep. 487.

<sup>2</sup> *Merchants' & C. Nat. Bank v. Kent*, 48 Mich. 292.

<sup>3</sup> *Williamson v. Wilson*, 1 Bland, 418.

<sup>4</sup> "And then only on the consent of parties whose interests are to be intrusted to their charge." Per Gresham, J., in *Atkins v. Wabash & C. Ry. Co.*, 29 Fed. Rep. 161. *Finance Co. v. Charleston & C. R. Co.*, 45 Fed. Rep. 486; *McCullough v. Merchants' L. & T. Co.*, 29 N. J. Eq. 217; *Freeholders & C. v. State Bank*,

28 N. J. Eq. 166; *Attorney-General v. Bank of Columbia*, 1 Paige, 511. See, however, *In re Fifty-four First Mortgage Bonds*, 15 S. C. 304. A distinction has been made between voluntary proceedings for winding up the affairs of a corporation and compulsory proceedings for that purpose in favor of eligibility in the former case. *Matter of Eagle Iron Works*, 8 Paige, 511; *Beach on Receivers*, § 38; *Buck v. Piedmont & C. Ins. Co.*, 4 Fed. Rep. 849.

<sup>5</sup> *Kilgore v. Hair*, 19 S. C. 496; *Bennesson v. Bill*, 62 Ill. 408; *Ex parte Fletcher*, 6 Ves. 427; *Garland v. Garland*, 2 Ves. 137. A clerk of the court may be appointed. *Beach on Receivers*, § 32, and cases there cited. But he is presumptively disqualified in the federal courts. 20 St. at L., ch. 183, p. 415 (see § 677, *supra*).

<sup>6</sup> *Sutton v. Jones*, 15 Ves. 584; *Anonymous*, 8 Ves. 516; *Anon. v. Jolland*, 8 Ves. 72.

<sup>7</sup> *Stone v. Wishart*, 2 Madd. 64.

<sup>8</sup> *Taylor v. Oldham*, 1 Jac. 527.

<sup>9</sup> *Eichberg v. Wickham*, 21 N. Y. Supl. 648, where O'Brien, J., points out the "anomaly of the same man accounting as assignee to himself as receiver."

one of the parties who was instrumental in preparing the assignment and in carrying out the arrangement that is attacked.<sup>1</sup> An act of congress provides that "no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member."<sup>2</sup>

§ 726. *Security of receivers.*—It is a general rule that the court appointing a receiver must require him to give security for the faithful discharge of his trust.<sup>3</sup> But the obligation to give security is founded upon the general practice of the court of chancery, and is sometimes dispensed with,<sup>4</sup> as, for instance, where the receivership is connected with other proceedings wherein the parties are already protected by adequate security,<sup>5</sup> or where the receiver is appointed by consent, in which case his own recognizance may be accepted as sufficient.<sup>6</sup> Where the decree appointing a receiver does not require him to give a bond, it has been held no defense to a suit brought by him to recover property belonging to the estate;<sup>7</sup> but if the order of appointment makes his giving bond a condition precedent to his taking and holding possession of the property,

<sup>1</sup> *People's Bank v. Fancher*, 21 N. Y. Supl. 545.

<sup>2</sup> 25 St. at L., ch. 373, § 7, p. 554.

<sup>3</sup> *Tomlinson v. Ward*, 2 Conn. 396, holding it to be error to appoint a receiver without requiring security; *Matter of Eagle Iron Works*, 8 Paige, 385; *Mead v. Lord Orrery*, 8 Atk. 235. See, also, *Johnson v. Martin*, 1 T. & C. (N. Y. Super. Ct.) 504; *Edwards v. Edwards*, 2 Ch. D. 291; *Ex parte Evans*, 13 Ch. D. 252; *Carper v. Hawkins*, 8 West Va. 304; *Williamson v. Wilson*, 1 Bland (Md.), 422; *Colmore v. North*, 27 L. T. (N. S.) 405; *Manners v. Furze*, 11 Beav. 30; *Tylee v. Tylee*, 17 Beav. 583. So additional security may be required upon an extension of the receivership to additional property. *Down-*

*shire v. Tyrrell*, Hayes, 354; *Wise v. Ashe*, 1 Ir. Eq. 210; *Beach on Receivers*, § 175. At least two sureties are usually required. *Mead v. Orrery*, 8 Atk. 235. But the court may in its discretion require only one. *Johnson v. Martin*, 1 T. & C. (N. Y. Super. Ct.) 504.

<sup>4</sup> *Beach on Receivers*, § 173; *Dilling v. Foster*, 21 S. C. 335, 339.

<sup>5</sup> *Banks v. Potter*, 21 How. Pr. 469.

<sup>6</sup> *Hibbert v. Hibbert*, 8 Mer. 681; *Ridout v. Earl of Plymouth*, Dick. 68; *Countess of Carlisle v. Berkley*, Amb. 599. *Contra*, *Bailie v. Bailie*, 1 Ir. Eq. 418. See *Manners v. Furze*, 11 Beav. 30.

<sup>7</sup> *Wilson v. Welch* (Mass.), 81 N. E. Rep. 712.

the omission to prove that he gave a bond is fatal to his right to recover.<sup>1</sup> In England the surety is required to be a freeholder;<sup>2</sup> but in the United States this evidence of responsibility is not usually required.<sup>3</sup> The court may lawfully accept sureties resident outside the jurisdiction of the court.<sup>4</sup> The amount and condition of the bond is usually stipulated in the order of appointment, the amount being fixed by the chancellor or officer making the appointment with due regard to the value or the magnitude of the interests committed to the charge of the receiver.<sup>5</sup> When the security becomes insufficient the court may make an order upon the receiver to show cause why he shall not give additional sureties, and upon his failure to do so may remove him and appoint another in his place.<sup>6</sup> Where the bond given by a receiver, upon his appointment, is not filed in the proper office, through inadvertence, the court may direct it to be filed *nunc pro tunc*.<sup>7</sup>

§ 727. The same subject continued — Liabilities of sureties.— The liability of a surety becomes absolute immediately upon the failure of his principal to perform his duty and account to the court in accordance with the condition of the bond.<sup>8</sup> The breach is usually demonstrated by a failure to account or to comply with an order to pay over money, upon a rule against the receiver procured by application to the court.<sup>9</sup> The party aggrieved then obtains leave of court to sue upon

<sup>1</sup> Hegewisch v. Silver, 21 N. Y. Blois v. Betts, Dick. 886; Lane v. Supl. 294. But a bond merely irregular or informal will not defeat the suit. Morgan v. Potter, 17 Hun, 408.

<sup>2</sup> Loft, 148.

<sup>3</sup> Beach on Receivers, § 177; Edwards on Receivers, 94; Smith on Receivers, 17.

<sup>4</sup> Taylor v. Life Ass'n, 8 Fed. Rep. 467. See, also, *Ex parte Milwaukee & Co. R. Co.*, 5 Wall. 188. Otherwise in England. Cockburn v. Raphael, 3 Sim. & Stu. 458.

<sup>5</sup> Beach on Receivers, § 179; Taylor v. Life Ass'n, 8 Fed. Rep. 465.

<sup>6</sup> Shackelford v. Shackelford, 82 Gratt. 481, 510, 514. See, also, Vaughan v. Vaughan, Dick. 90;

<sup>7</sup> Whiteside v. Prendergast, 2 Barb. Ch. 471.

<sup>8</sup> Maunsell v. Egan, 8 Jones & Lat. (Ir.) 252; Ross v. Williams, 11 Heisk. (Tenn.) 410. See, also, Commonwealth v. Gould, 118 Mass. 300.

<sup>9</sup> Bank of Washington v. Creditors, 86 N. C. 828; Atkinson v. Smith, 89 N. C. 72; State v. Gibson, 21 Ark. 140; Titus v. Fairchild, 49 N. Y. Super. Ct. 211, 221. If the receiver dies the remedy is directly against the sureties on their bond. Weems v. Lathrop, 42 Tex. 207; French v. Dauchy, 57 Hun, 100; Ludgater v. Channell, 3 M. & G. 175.

the bond;<sup>1</sup> and it has been held that the liability of the surety cannot be ascertained and enforced against the surety by proceedings in the court of chancery, but only by an action at law upon the bond, where the defendant has a constitutional right of trial by jury.<sup>2</sup> The surety is not liable for any default or misconduct of the receiver prior to the execution of the bond, where the undertaking was that the receiver "henceforth" faithfully discharge his duties.<sup>3</sup> A surety who has advanced or been compelled to pay money on account of his obligation is entitled, upon application to the court, to be indemnified out of the balance, if any there be due to the receiver.<sup>4</sup> Sureties of a receiver cannot be discharged upon their own application, unless it appear to be clearly for the benefit of the estate or of the parties to the cause,<sup>5</sup> or "where underhand practice is proved, and the person secured shown to be connected with such practice."<sup>6</sup> Where the court, at the instance of a party to the case, requires a receiver to execute a new bond in the same penalty and conditioned as the old bond, the new bond will not operate to discharge the surety of the old bond from liability for future defaults of the receiver, in the absence of circumstances to show that the second bond was intended as a substitute for, rather than as supplemental to, the first.<sup>7</sup>

**§ 728. Who may apply for a receiver.**—A proceeding for the appointment of a receiver cannot be inaugurated or con-

<sup>1</sup> *Bank of Washington v. Creditors*, 86 N. C. 323; *Atkinson v. Smith*, 86 N. C. 72; *State v. Gibson*, 21 Ark. 110.

<sup>2</sup> *Thurman v. Morgan*, 79 Va. 372. But see *Bank v. Duncan*, 52 Miss. 740; *Atkinson v. Smith*, 89 N. C. 74; *Seidenbach v. Denksenspiel*, 11 Lea (Tenn.), 297.

<sup>3</sup> 20 Am. & Eng. Encyc. of Law, 165; *Thompson v. McGregor*, 81 N. Y. 593; *Bissell v. Saxton*, 66 N. Y. 60; *Rochester v. Randall*, 105 Mass. 295; s. c., 8 Am. Rep. 519; *Vivian v. Otis*, 24 Wis. 518; *Myers v. United States*, 1 McLean, 498; *Farrar v. United States*, 5 Pet. 389; *United States v. Boyd*, 15 Pet. 187; *United States v. Giles*, 9 Cranch, 212. The

liability of a surety is probably limited by the penalty of the bond. *State v. Blakemore*, 7 Heisk. (Tenn.) 657; *Walker v. Wild*, 1 Madd. 538.

<sup>4</sup> *Glossup v. Harrison*, 3 Ves. & B. 184.

<sup>5</sup> *Griffith v. Griffith*, 2 Ves. 400; *Gordon v. Calvert*, 2 Sim. 253.

<sup>6</sup> *Hamilton v. Brewster*, 2 Molloy, 407. If a surety during the continuance of the receivership procures his discharge, the receiver must enter into a fresh recognizance with new sureties. *Vaughan v. Vaughan*, Dick. 90; *Blois v. Betts*, Dick. 386.

<sup>7</sup> *Stewart v. Johnston*, 87 Ga. 97; s. c., 13 S. E. Rep. 258.



ducted by a stranger having no connection with or interest in the subject-matter of the litigation.<sup>1</sup> It can only be made on the application of one having an acknowledged or strong presumptive title in himself or in common with others in the fund.<sup>2</sup> A receiver should not be appointed over property in possession of a person not a party to the cause.<sup>3</sup> An insolvent stockholder is not a necessary party defendant to a proceeding against a corporation to obtain a receiver therefor, and to compel the individual stockholders to pay up their subscriptions so far as necessary to pay corporate debts.<sup>4</sup> "Before a decree it seems that one defendant cannot move for a receiver<sup>5</sup> unless he has filed a cross-bill for one.<sup>6</sup> After a decree, however, he may in a proper case obtain a receiver of the property of a co-defendant upon petition,<sup>7</sup> but not usually over the property of the plaintiff without a cross-bill.<sup>8</sup>

§ 729. **Requisites of the application — Motion and affidavits.**— The facts which show the necessity or propriety of the appointment should be stated in the bill, so that the other party may answer them.<sup>9</sup> It is the better practice to insert a specific prayer for a receiver in the bill,<sup>10</sup> but a receiver may be appointed at a final hearing, though there be no prayer for a receiver.<sup>11</sup> The application must show clearly such facts

<sup>1</sup> *O'Mahoney v. Belmont*, 62 N. Y. § 258; *Grote v. Bury*, 1 W. R. 92; 188; *Walker v. Drew*, 20 Fla. 918. *Robinson v. Hadley*, 11 Beav. 614;

<sup>2</sup> *Beach on Receivers*, § 118; *Fellows v. Heermans*, 18 Abb. Pr. (N. S.) 8. *Kerr on Receivers* (2d Am. ed.), 153, 154.

<sup>3</sup> *Searles v. Jacksonville &c. R. Co.*, 2 Woods, 621, 626. <sup>4</sup> *Tomlinson v. Ward*, 2 Conn. 400; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 450. Where the complaint for the appointment of a receiver of property, in which plaintiff claims an interest, shows that plaintiff may have ample remedy against defendants by attachment or by injunction, an order denying the relief sought will not be disturbed on appeal; such relief being discretionary with the chancellor. *Harmon v. Kentucky Coal, Iron & Development Co. (Ky.)*, 21 S. W. Rep. 1054.

<sup>5</sup> *Wilson v. California Wine Co. (Mich.)*, 54 N. W. Rep. 648.

<sup>6</sup> *Robinson v. Hadley*, 11 Beav. 614; *Leddell's Ex'r v. Starr*, 19 N. J. Eq. 160. But see *Sargant v. Read*, L. R. 1 Ch. D. 600; *Henshaw v. Wells*, 9 Humph. (Pa.) 568.

<sup>7</sup> *Grote v. Bury*, 1 W. R. 92; *Robinson v. Hadley*, 11 Beav. 614; *Kerr on Receivers* (2d Am. ed.), 153, 154.

<sup>8</sup> *Barlow v. Gains*, 8 Beav. 529; *Hiles v. Moore*, 15 Beav. 175; *Kerr on Receivers* (2d Am. ed.), 154.

<sup>9</sup> 1 *Foster's Federal Practice* (2d ed.),

<sup>10</sup> *Beach on Receivers*, § 130.

<sup>11</sup> *Bowman v. Bell*, 14 Sim. 392; *Commercial & Sav. Bank v. Corbett*,

as will justify the appointment of a receiver. Mere statements upon information and belief,<sup>1</sup> or averments of conclusions of law, are not sufficient.<sup>2</sup> Amendable defects in the bill are not fatal to the application.<sup>3</sup> The fact that a petition for a receiver is not verified is no cause for dismissing it at the final hearing on the merits; the receiver having been previously appointed, and no exception having been taken to the appointment.<sup>4</sup> A plaintiff can move on his bill and on affidavits besides; and the defendant in such case may use his answer as an affidavit,<sup>5</sup> or he may read depositions in reply to the plaintiff's affidavits.<sup>6</sup> Affidavits may be read in support of the complaint or bill, but not to enlarge the case made by it.<sup>7</sup> On motion for a receiver, if a defendant sets up and relies upon, in his affidavits, any new matter not directly responsive to the matters set up in the complainant's affidavits, the complainant may read affidavits in reply to such new matter. But it would be unwise to permit defendant to file surrebutting affidavits.<sup>8</sup> A sworn answer denying all the equities contained in the bill will defeat the application unless the plaintiff introduces in support of his bill such evidence as will overcome the denials of the answer.<sup>9</sup> After a motion for a receiver has been denied it may be renewed upon new facts.<sup>10</sup>

**§ 730. Notice of application for appointment.**—The general rule is that a receiver cannot be appointed to deprive the defendant of the possession of his property without giving him notice and an opportunity to be heard in relation to his

5 *Sawy.* 172; *Osborne v. Harvey*, 1 *man v. Whitcomb*, 1 *J. & W.* 569; *Y. & Coll. (Ch.)* 116; *Shannon v. Kershaw v. Mathews*, 1 *Russ.* 361. *Hanks*, 88 *Va.* 333; *a. c.*, 18 *S. E. Rep.* 437.

<sup>1</sup> *Cofer v. Echerson*, 6 *Iowa*, 502; *Hanna v. Hanna*, 89 *N. C.* 68; *Blondheim v. Moore*, 11 *Md.* 365. <sup>2</sup> *Beach on Receivers*, § 124; *Heavilon v. Farmers' Bank*, 81 *Ind.* 249.

<sup>3</sup> *Evans v. Coventry*, 31 *Eng. Eq.* 436; *Ex parte Walker*, 25 *Ala.* 81. <sup>4</sup> *Bass v. Woolf (Ga.)*, 14 *S. E. Rep.* 539. <sup>5</sup> *Beach on Receivers*, § 135; *Good-*

*man v. Whitcomb*, 1 *J. & W.* 569; *Kershaw v. Mathews*, 1 *Russ.* 361.

<sup>6</sup> *Beach on Receivers*, § 135.

<sup>7</sup> *Hayes v. Heyer*, 4 *Sandf. Ch.* 485. 487.

<sup>8</sup> *Sobenheimer v. Wheeler*, 45 *N. J. Eq.* 614.

<sup>9</sup> *Beach on Receivers*, § 151, and cases there cited. See § 366 *et seq.*, *supra*; *Allen v. Dallas & c. R. Co.*, 3 *Woods*, 316, 333.

<sup>10</sup> *Attorney-General v. Mayor & c.*, 1 *Molloy*, 95; *Fenton v. Lumberman's Bank*, *Clarke's Ch.* 360.

rights.<sup>1</sup> A minority of the board of directors of a corporation applied for the appointment of a receiver for the sole purpose of wrecking the concern, and the president of the corporation in collusion with them appeared and confessed the allegations of the bill and consented to the appointment of a receiver. Upon a motion by authority of the corporation to va-

<sup>1</sup> *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 488; *Haugan v. Netland* (Minn.), 58 N. W. Rep. 878; *People v. Norton*, 1 Paige, 17; *Blondheim v. Moore*, 11 Md. 365; *Tibbals v. Sergeant*, 14 N. J. Eq. 449; *Gibson v. Martin*, 8 Paige, 481; *Sanford v. Sinclair*, 8 Paige, 878; *Hart v. Time*, 3 Edw. Ch. 226; *Jones v. Schall*, 45 Mich. 380; *Ruffner v. Navis*, 38 West Va. 655; *Moritz v. Miller*, 87 Ala. 882; *Field v. Ripley*, 20 How. Pr. 26; *Arnold v. Bright*, 41 Mich. 210; *Fricker v. Peters & Co.*, 21 Fla. 254; *Moyers v. Coiner*, 23 Fla. 422; *Railway Co. v. Jewett*, 37 Ohio St. 659; *Ogden v. Kipp*, 6 Johns. Ch. 161; *Caillard v. Caillard*, 25 Beav. 512; *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286. "*Ex parte* applications for a receiver ought not to be granted, even after judgment, except in case of emergency, and it is desirable that this rule should always be borne in mind, and not be lightly departed from." Per Lindley, L. J., in *Lucas v. Harris*, L. R. 18 Q. B. D. 127. Less than one day's notice has been held too short. *St. Louis & Co. Ry. Co. v. Dewees*, 28 Fed. Rep. 691. Under the Connecticut acts of 1867, chapter 79, providing for the appointment of a receiver of a copartnership, but not requiring notice, an appointment without reasonable notice to the adverse party is erroneous. *Bostwick v. Isbell*, 41 Conn. 305, holding that the statute would be unconstitutional were it construed as authorizing an appointment without notice. See, also, *McCarthy v. Peake*, 18 How. Pr. 140. In

an action to quiet title to land, and to enjoin defendant, who resided on it, from tilling it, both during the pendency of the action and permanently, the complaint was verified only on information and belief by one of plaintiffs' attorneys. A verified answer was served, denying the facts and equities set out in the complaint. After the service of the answer, and before a trial was had, plaintiffs, without notice to defendant or his counsel, applied to the district court for an order appointing a receiver of the crops planted by the defendant and growing on the land. The application was based on an affidavit setting out, among other things, defendant's insolvency, and that the crops were "liable to be mortgaged," but no attempt was made to support the original equities set out in the complaint. It was held that an *ex parte* order appointing the receiver was error, since the appointment of receivers *ex parte* is not tolerated by the courts except in cases of the gravest emergency, and to prevent irreparable injury. *Grandin v. La Bar* (N. D.), 50 N. W. Rep. 151. Where a receiver has been appointed by the register without notice to the defendant, but, on appeal by the latter, the chancellor has confirmed the appointment after allowing the introduction of new affidavits, and defendant's answer, the receiver will not be discharged for lack of such notice. *Peter v. Kahn* (Ala.), 9 So. Rep. 729.

cate the order and discharge the receiver, and it appearing that there was no merit in the bill, the court held that the president, as such, had no authority to confess the bill or consent to the order, and that therefore it was obtained without any notice to the corporation; and the receiver was discharged with all the costs of the receivership, including the fees and expenses of the receiver, taxed against the plaintiff.<sup>1</sup> But the rule requiring notice is not inflexible so as to prevent the court from proceeding in cases where it is impracticable to give legal notice, as in the case of absconding or non-resident defendants,<sup>2</sup> or in cases of great emergency demanding the immediate interference of the court for the prevention of irreparable injury.<sup>3</sup> Subject to proper limitations the court may in such

<sup>1</sup> *Walters v. Anglo-American M. & T. Co.*, 50 Fed. Rep. 816.

<sup>2</sup> *Maguire v. Allen*, 1 B. & B. 75, 76; *Pitcher v. Hellier*, 2 Dick. 580; *People v. Norton*, 1 Paige, 17; *Gibbons v. Mainwaring*, 9 Sim. 77; *Dowling v. Hudson*, 14 Beav. 424. It is not necessary to serve a notice of the appointment of a receiver on the trustee for mortgage bondholders of a corporation, who is insane, and confined in an asylum in a foreign country. *Etklinger v. Persian Rug & Carpet Co.*, 20 N. Y. Supl. 772, holding also that the New York Code of Civil Procedure, section 714, providing that a temporary receiver shall only be appointed without notice in a case where an order of publication for the purpose of acquiring jurisdiction over the defendant has been published, does not prevent the appointment of a receiver for an insolvent corporation without notice, where the court has acquired jurisdiction of the corporation by service on it, and its appearance by attorney.

<sup>3</sup> *Vann v. Barnett*, 2 Bro. C. C. 158; *Sandford v. Sinclair*, 8 Paige, 375; *Oil Run Petroleum Co. v. Gale*, 6 West Va. 545; *Ashhurst v. Lehman*, 86 Ala. 371; *Sims v. Adams*, 78 Ala.

897; *People v. Norton*, 1 Paige, 18; *Fricker v. Peters & Co.*, 21 Fla. 264; *Moyers v. Coiner*, 22 Fla. 422; *Trilbert v. Burgess*, 11 Md. 452; *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286. The appointment of a receiver for a foreign corporation is not void because the court at the time had not acquired personal jurisdiction of the defendant, where it had jurisdiction of the subject-matter, by a showing of an immediate necessity for such appointment. *Glines v. Supreme Sitting Order of Iron Hall*, 20 N. Y. Supl. 275. Averments in a bill by a mortgagee against a mortgagor showing default in payment of the note at maturity; that the mortgagor had in bad faith sold the mortgaged property; that the vendee refused to attorn and deliver up possession to the mortgagee; that the mortgagor and vendee were both insolvent; that the vendee had removed a portion of the crops, and there was danger of further loss of crops; and that the security was inadequate,—show a *prima facie* case, and justify the appointment of a receiver on an *ex parte* application without notice where a bond of indemnity is given. *Hendrix v. Ameri-*

cases proceed without notice and leave the party to vacate the order if he chooses to come in and submit to the jurisdiction of the court.<sup>1</sup> Where it is proper to appoint a receiver *ex parte*, the particular circumstances which render such a summary proceeding necessary should be distinctly stated in the bill or petition on which the application is founded.<sup>2</sup>

§ 731. *Receivers' certificates, when authorized.*—A receiver's certificate may be defined to be a non-negotiable evidence of debt or debenture, issued by authority of a court of chancery as a first lien upon the property of a debtor corporation in the hands of a receiver.<sup>3</sup> It is only against railroad mortgagees that the United States Supreme Court has sustained orders giving priority to receivers' certificates representing particular indebtedness, and then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public.<sup>4</sup> The power to au-

can Freehold Land Mortgage Company of London (Ala.), 11 So. Rep. 218. In an action of foreclosure against a non-resident mortgagor, where an application is made for the appointment of a receiver to collect the rents and profits, and only two days' notice is given defendant, who appears specially by counsel and objects to the hearing, and the court overrules the objection, but gives a reasonable time to prepare for the motion, and defendant subsequently appears and resists, the action of the court in proceeding to the hearing on the merits will be sustained on appeal as being within its reasonable discretion. *Haugan v. Netland* (Minn.), 58 N. W. Rep. 878.

<sup>1</sup> *Haugan v. Netland* (Minn.), 58 N. W. Rep. 878. Where a receiver is appointed without notice, the defendant has a right afterwards to apply for relief against the order appointing such receiver. *People v. Norton*, 1 Paige, 17. A State court appointed a receiver *ex parte*, and after removal of the case to the fed-

eral court the latter, upon full hearing, rescinded the order appointing him. *McHenry v. N. Y. & C. R. Co.*, 25 Fed. Rep. 114.

<sup>2</sup> *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438. Revised Statutes of Indiana, section 1280, provides that receivers shall not be appointed in any case until the adverse party shall have appeared, or shall have reasonable notice of the application for such appointment, "except upon sufficient cause shown by affidavit." It was held that where a verified complaint stated that there was an emergency for the *ex parte* appointment of a receiver, but failed to state the facts on which the opinion of plaintiff was founded, such appointment was not justified. *Wabash R. Co. v. Dykeman* (Ind.), 32 N. E. Rep. 828.

<sup>3</sup> *Beach on Receivers*, § 879.

<sup>4</sup> *Farmers' L. & T. Co. v. Grape Creek Coal Co.*, 50 Fed. Rep. 481. Citing *Fosdick v. Schall*, 99 U. S. 235; *Barton v. Barbour*, 104 U. S. 126; *Miltenberger v. Railroad Co.*, 106 U. S. 286; s. c., 1 S. Ct. Rep. 140; *Union*

thorize the issue of receivers' certificates "is undoubtedly to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund."<sup>1</sup> "The courts have seen fit to authorize the issue of receivers' certificates where it was found necessary to make extensive repairs in order to operate the railroad, and the current income was inadequate to meet the expense;<sup>2</sup> for the improvement, repair and operation of the road;<sup>3</sup> for the payment of taxes, labor, materials and supplies due prior to the abandonment of the receiver;<sup>4</sup> for further construction, equipment and final completion of the road;<sup>5</sup> to complete an unfinished

*Trust Co. v. Railroad Co.*, 117 U. S. 494; s. c., 6 S. Ct. Rep. 809; *Wood v. Trust Co.*, 128 U. S. 421; s. c., 9 S. Ct. Rep. 181; *Kneeland v. Trust Co.*, 136 U. S. 89; s. c., 10 S. Ct. Rep. 950; *Morgan's, etc. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171; s. c., 11 S. Ct. Rep. 61. In *Wallace v. Loomis*, 97 U. S. 146, Justice Bradley said:—"The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day be seriously disputed. It is a part of that jurisdiction always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands." See, also, *Meyer v. Johnson*, 53 Ala. 287; *Union Trust Co. v. Illinois & C. R. Co.*, 117 U. S. 484; *Miltenerberger v. Logansport R. Co.*, 106 U. S. 286; *Hoover v. Montclair & C. R. Co.*, 29 N. J. Eq. 4.

<sup>1</sup> Per Justice Bradley in *Wallace v. Loomis*, 97 U. S. 146; *Investment Co. v. Ohio & C. R. Co.*, 86 Fed. Rep. 48; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46, where Caldwell, J., said that "if the road cannot be kept

running without its exercise, except to a limited extent, the safe and sound practice is to discharge the receiver or stop running the road and speed the foreclosure." *Shaw v. Railroad Co.*, 100 U. S. 605, 612; *Barton v. Barbour*, 104 U. S. 126, 138; *Taylor v. Philadelphia & C. R. Co.*, 9 Fed. Rep. 1.

<sup>2</sup> *Hoover v. Montclair & C. R. Co.*, 29 N. J. Eq. 4; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46.

<sup>3</sup> *Turner v. Peoria & C. R. Co.*, 95 Ill. 134; s. c., 1 Am. & Eng. R. Cas. 348; 35 Am. Rep. 144; *Stanton v. Alabama & C. R. Co.*, 2 Woods, 506.

<sup>4</sup> *Humphreys v. Allen*, 101 Ill. 490; s. c., 4 Am. & Eng. R. Cas. 14; *Langdon v. Vermont & C. R. Co.*, 53 Vt. 228; s. c., 4 Am. & Eng. R. Cas. 38; *Taylor v. Philadelphia & C. R. Co.*, 7 Fed. Rep. 377; *Union Trust Co. v. Illinois & C. R. Co.*, 117 U. S. 484; s. c., 25 Am. & Eng. R. Cas. 560. See, also, *Douglass v. Cline*, 12 Bush (Ky.), 608; *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.), 678. But see *Raht v. At-trill*, 42 Hun, 414.

<sup>5</sup> *Bank of Montreal v. Chicago & C. R. Co.*, 48 Iowa, 518; *Bank of Montreal v. Thayer*, 7 Fed. Rep. 622; *Gilbert v. Washington City & C. R. Co.*, 38 Gratt. 586; s. c., 1 Am. & Eng. R. Cas. 478; *Smith v. McCullough*, 104 U. S. 25; s. c., 3 Am. & Eng. R. Cas. 159; *Miltenerberger v. Logansport R.*

portion of the road within a certain time fixed by law, for the purpose of acquiring valuable land grants and franchises depending on such completion;<sup>1</sup> for the purchase of rolling-stock and for the preservation, management and repair of the road;<sup>2</sup> for the purchase of rolling-stock, machinery and necessary supplies, and to repair and to operate the road;<sup>3</sup> to replace earnings diverted from operating expenses and ordinary repairs;<sup>4</sup> for relaying in a substantial manner a portion of the track hastily built and considered unsafe;<sup>5</sup> to pay the rent of locomotives leased by the company and in use on the road;<sup>6</sup> to build and thereby complete certain portions of the road at a stipulated expenditure per mile.<sup>7</sup> The lien of receivers' certificates may be enforced in an independent suit,<sup>8</sup> and in a court exercising ancillary jurisdiction."<sup>9</sup>

§ 732. Orders authorizing receivers' certificates.—An order for the issue of receivers' certificates is usually made only after notice to all the parties in interest.<sup>10</sup> But a full opportunity to be heard on evidence as to the propriety of the ex-

Co., 106 U. S. 286; s. c., 12 Am. & Eng. R. Cas. 464. But the issuing of receivers' certificates for the purpose of borrowing money to complete an unfinished road should not be authorized except under extraordinary circumstances. *Shaw v. Little Rock &c. R. Co.*, 100 U. S. 612. See, also, *Hand v. Savannah &c. R. Co.*, 10 S. C. 406; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46.

<sup>1</sup> *Kennedy v. St. Paul &c. R. Co.*, 2 Dill. 448; *Jerome v. McCarter*, 94 U. S. 734.

<sup>2</sup> *Hoover v. Montclair &c. R. Co.*, 29 N. J. Eq. 4; *Vermont &c. R. Co. v. Vermont Cent. R. Co.*, 50 Vt. 500. See, also, *Vilas v. Page*, 106 N. Y. 489.

<sup>3</sup> *Wallace v. Loomis*, 97 U. S. 146; *Swan v. Clark*, 110 U. S. 602; s. c., 17 Am. & Eng. R. Cas. 354; *Turner v. Peoria &c. R. Co.*, 95 Ill. 184; s. c., 1 Am. & Eng. R. Cas. 348; *Meyer v. Johnson*, 58 Ala. 237.

<sup>4</sup> *Union Trust Co. v. Illinois &c. R.*

*Co.*, 117 U. S. 484; s. c., 25 Am. & Eng. R. Cas. 560.

<sup>5</sup> *Stanton v. Alabama &c. R. Co.*, 2 Woods, 506. See, also, *Cowdrey v. Railroad Co.*, 1 Woods, 381; *In re United States Rolling-stock Co.*, 53 How. Pr. 286.

<sup>6</sup> *Coe v. New Jersey &c. R. Co.*, 27 N. J. Eq. 37; *Turner v. Peoria &c. R. Co.*, 95 Ill. 184; s. c., 1 Am. & Eng. R. Cas. 348; 35 Am. Rep. 144.

<sup>7</sup> 90 Am. & Eng. Encyc. of Law, 399, 400, 401; *Bank of Montreal v. Chicago &c. R. Co.*, 48 Iowa, 518. See, also, *Gibert v. Washington &c. R. Co.*, 38 Gratt. 586; s. c., 1 Am. & Eng. R. Cas. 478, and cases cited in *Meyer v. Johnson*, 58 Ala. 237.

<sup>8</sup> *Swan v. Clark*, 110 U. S. 602. See, however, *Turner v. Peoria &c. R. Co.*, 95 Ill. 184; s. c., 1 Am. & Eng. R. Cas. 348; 35 Am. Rep. 144.

<sup>9</sup> *Mercantile Trust Co. v. Kanawha &c. Ry. Co.*, 50 Fed. Rep. 874.

<sup>10</sup> *Ex parte Mitchell*, 12 S. C. 83.

penditures, and of making them a first lien, is judicially equivalent to prior notice.<sup>1</sup> Lienholders entitled to notice of an order authorizing a receiver to issue certificates who receive no notice may come in and contest the necessity, validity, effect and amount of all such certificates, and the court will establish the priorities as between the certificates and the liens according to the equities of the case.<sup>2</sup> The receiver and those lending money to him on certificates issued on orders made without prior notice to the parties interested take the risk of final action of the court in regard to the loans.<sup>3</sup> But the order stands until set aside, and a reference to determine all claims against the receiver and the confirmation of the report upon the reference which makes no allusion to the certificates is not an adjudication against them when it appears that the holder had no notice of the reference.<sup>4</sup> It has been held that one who knows that certificates are about to be issued and made a paramount lien, and who neglects to intervene and raise his objections, is estopped to contest their validity after third parties have invested money in such certificates in good faith.<sup>5</sup> So a purchaser at a judicial sale made subject to the payment of receivers' certificates is estopped from denying their validity.<sup>6</sup> The terms of the order cannot be extended or altered by implication.<sup>7</sup> Under an order authorizing the issuance of receivers' certificates to pay taxes, "wages and freights due and to become due," certificates given to secure a debt to a merchant incurred by giving orders upon him to employees in payment of wages were held invalid.<sup>8</sup> An appeal will

<sup>1</sup> Union Trust Co. v. Illinois &c. R. Co., 117 U. S. 484; s. c., 25 Am. & Eng. R. Cas. 560. See, also, Miltenberger v. Logansport &c. R. Co., 106 U. S. 286; s. c., 12 Am. & Eng. R. Cas. 464.

<sup>2</sup> Hervey v. Ill. Mid. Ry. Co., 28 Fed. Rep. 169.

<sup>3</sup> Union Trust Co. v. Illinois &c. Ry. Co., 117 U. S. 484; Mercantile Trust Co. v. Kanawha &c. Ry. Co., 50 Fed. Rep. 874.

<sup>4</sup> Mercantile Trust Co. v. Kanawha &c. Ry. Co., 50 Fed. Rep. 874, citing to the last point, Ravee v. Farmer, 4

Term R. 146; Golightly v. Jellicoe, Hil. 9 Geo. 2, B. R., referred to in the note to Ravee v. Farmer, *supra*.

<sup>5</sup> Humphreys v. Allen, 101 Ill. 490; s. c., 4 Am. & Eng. R. Cas. 1. See, also, Miltenberger v. Logansport &c. Ry. Co., 106 U. S. 286; Union Trust Co. v. Illinois &c. R. Co., 117 U. S. 484.

<sup>6</sup> Central Nat. Bank v. Hazard, 80 Fed. Rep. 484.

<sup>7</sup> State v. Edgefield &c. R. Co., 5 Lea (Tenn.), 358.

<sup>8</sup> Fidelity Ins. Co. v. Shenandoah Iron Co., 42 Fed. Rep. 372.



lie from an order authorizing the issue of receivers' certificates.<sup>1</sup>

§ 733. **Negotiability of receivers' certificates.**—Receivers' certificates are not commercial paper, and the holder takes them subject to all equities between the original parties even though he acquired them for value and without notice.<sup>2</sup> When such certificates are negotiated at a discount which the receiver is not authorized to allow, a subsequent *bona fide* holder will only be protected to the amount actually advanced by the first purchaser.<sup>3</sup> When the receiver uses and disposes of certificates in a manner not in accordance with the order of the court authorizing their issue, they are invalid and of no effect.<sup>4</sup>

<sup>1</sup> Farmers L. & T. Co., Petitioners, 129 U. S. 206.

<sup>2</sup> Central Nat. Bank v. Hazard, 80 Fed. Rep. 484; Turner v. Peoria &c. R. Co., 95 Ill. 184; s. c., 1 Am. & Eng. R. Cas. 848; 85 Am. Rep. 144; Stanton v. Alabama &c. R. Co., 2 Woods, 506; Baird v. Underwood, 74 Ill. 176; Bank of Montreal v. Chicago &c. R. Co., 48 Iowa, 518; Union Trust Co. v. Chicago &c. R. Co., 7 Fed. Rep. 513; Newbold v. Peoria &c. R. Co., 5 Ill. App. 367. In Turner v. Peoria &c. R. Co., 95 Ill. 184; s. c., 1 Am. & Eng. R. Cas. 848; 85 Am. Rep. 144, Scott, J., said:—"The conclusion reached rests upon legal principles that have long been settled, but the rule deducible therefrom has the strongest equitable consideration for its support. It usually appears on the face of such instruments by what authority they were issued and for what specific purpose. Holders, therefore, will always be chargeable with notice of these facts. Considerations of the highest concern to all parties interested in the trust property make it imperative that the court that charges the fund, through its appointed officer, should have the most vigilant care that the property

is not improvidently wasted. All persons dealing in such securities must know that payment can only be coerced by application to the court having control of the trust property for an order upon its acting officer. Such certificates have not been current in commercial transactions as bills of exchange and other negotiable paper, nor are they likely to become so. It is known they are issued only for the benefit of the trust property, and usually the specific purpose is mentioned on the face, or, as in this case, on the back, of the certificate. The design is only to charge the trust property, and that only so far as it is equitable to do so. While courts will be zealous to protect the rights of parties who may have furnished money for the preservation of the trust property, equal care will be observed to see that the property is not wasted by improvident acts of receivers."

<sup>3</sup> Central Nat. Bank v. Hazard, 80 Fed. Rep. 484.

<sup>4</sup> Stanton v. Alabama &c. R. Co., 81 Fed. Rep. 585, holding that a contract to pay invalid certificates issued by a receiver, made by a purchaser of the property who subsequently

§ 734. **Priorities in railroad mortgage foreclosures.**—The doctrine established by the decisions of the United States Supreme Court and circuit courts is that "railroad property, when the railroad is a going concern, differs from all other property in this:—If the mortgage creditors ask the aid of the court in foreclosing their lien they can be put upon terms. Before the property is taken out of the hands of the legal owner and put into that of a receiver, provision must be made for the payment of balances due to connecting lines, and for the satisfaction of certain favored claims, such as wages for laborers, employees, and the like, accruing within a certain time before the application for a receiver. This condition seems to be imposed within the discretion, and to rest only in the discretion, of the court.<sup>1</sup> And if in the course of in-

became receiver, not being required by an order of the court, cannot be enforced against the receiver in his official capacity, nor the property be made liable thereon.

<sup>1</sup> *Thomas v. Railway Co.*, 86 Fed. Rep. 817. See, also, *Central Trust Co. v. St. Louis &c. Ry. Co.*, 41 Fed. Rep. 551. And for decisions in the State courts, see *Poland v. Lamolille Valley R. Co.*, 52 Vt. 144; *Williamson v. Washington City &c. R. Co.*, 38 Gratt. 624; *Duncan v. Chesapeake &c. R. Co. (Va.)*, 15 Law Reg. (N. S.) 428; *Douglas v. Kline*, 19 Bush (Ky.), 608; *Fidelity Ins. &c. Co. v. Shenandoah Valley R. Co.*, 86 Va. 1; *McIlhenny v. Binz*, 80 Tex. 1; *Meyer v. Johnson*, 53 Ala. 287; *Bank of Montreal v. Chicago &c. R. Co.*, 48 Iowa, 518. Where a second mortgagee brings a suit for foreclosure and a receiver is appointed on his application, a party furnishing supplies to keep the road a going concern has an equity against him but not against the first mortgagees, although the latter file cross-bills in the suit. *Bound v. South Carolina Ry. Co.*, 47 Fed. Rep. 30. "When a court of chancery is asked by railroad mortgagees to ap-

point a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property as may, under the circumstances of the case, appear to be reasonable. *Fosdick v. Schall*, 99 U. S. 251." *Union Trust Co. v. Scuttler*, 107 U. S. 591. "The cases following *Fosdick v. Schall* agree that the mortgagee or lien holder who procures a receivership thereby consents to the subjection of his interest in the property of which possession is taken at his instance to the discharge of liabilities and expenses incurred by the receiver under the proper order of the court." *Central Trust Co. v. Wabash &c. Ry. Co.*, 46 Fed. Rep. 26, 33. But in *Kneeland v. American Loan Co.*, 136 U. S. 97, it was said that when a court appoints a receiver of railroad property it has no right to make that receivership conditional on the payment of other

vestigation it shall appear that there are still unpaid creditors who furnished supplies and materials necessary for running the road, and that interest has been paid on mortgage bonds, or permanent improvements made, out of the earnings during the period when such debts were contracted, the court which has appointed the receiver will order the amount so used for interest or improvements to be brought in for the benefit of this class of creditors, either from the earnings in the hands of the receiver, or, failing these, from the *corpus* of the property."<sup>1</sup> In order to create an equity prior to the rights of the mortgagee, the following conditions must concur:—"The railroad company must have been kept a going concern. The creditor must have aided with necessary material, supplies or equipment in so keeping it a going concern. It must have made earnings. These earnings must have been used in whole or in part in the payment of interest, or in making permanent improvements, or for the benefit in some way of the mortgage creditors or stockholders."<sup>2</sup> Where a trustee for

than those few unsecured claims which, by the rulings of the court, have been declared to have an equitable priority. Nevertheless, in *Farmers' L. & T. Co. v. Kansas City & C. R. Co.*, 58 Fed. Rep. 182, the court asserted an uncontrollable discretion by exacting an express assent to the terms imposed. Some very nice distinctions have been taken between preferential and non-preferential debts, and where the court intended to make a condition comprehensive enough to silence contention on that subject, it declined to act upon the assent of counsel until the party applying for the appointment had been advised of the proposed conditions and expressly instructed its counsel to assent thereto. *Farmers' L. & T. Co. v. Kansas City & C. R. Co.*, *supra*, where Caldwell, C. J., in a vigorous opinion, vindicates the propriety of prescribing conditions for the payment of debts for labor, supplies and material, and pronounces it

the "later and sounder practice," on general principles of equity. But no claims should be allowed which do not fall clearly within the condition. *s. c.*, 192.

<sup>1</sup> Per Simonton, J., in *Finance Co. v. Charleston & C. R. Co.*, 48 Fed. Rep. 188, 189, 190; *Fosdick v. Schall*, 99 U. S. 285; *Thomas v. Railway Co.*, 86 Fed. Rep. 817, 818, 819, where many authorities are collected.

<sup>2</sup> Per Simonton, J., in *Finance Co. v. Charleston & C. R. Co.*, 48 Fed. Rep. 188, 190. See *Burnham v. Bowen*, 111 U. S. 782. "The doctrine of *Fosdick v. Schall* is applicable wholly to debts incurred for operating expenses, and does not apply where it is a question of original construction. . . . It only applies where there is a diversion of the income of a going concern from the parties to which that income is equitably and primarily devoted." *Wood v. Deposit Co.*, 128 U. S. 421; *s. c.*, 9 S. Ct. Rep. 181; *American L. & T. Co.*

railroad mortgage bondholders in good faith assents to such terms, the bondholders are bound by the assent as fully and absolutely as if it had been given by them in person.<sup>1</sup>

§ 735. The same subject continued —“Six months rule.” Preferential debts, it is commonly said, are those which have aided to conserve the property, and have been contracted within some reasonable period. Just what debts aid to conserve the property, and what length of time will bar them, is not very clear upon the authorities, and depends largely upon the circumstances of each particular case.<sup>2</sup> The power to give priority is not limited to cases where there has been a diversion of the income of the road, and they may be made a charge upon the *corpus* of the estate if the earnings are not sufficient to pay them.<sup>3</sup> Nor is it essential that the order for the payment of preferential debts should be made at the time and as a condition of appointing a receiver. The better practice is to do so, but, if such an order is not then made, it may be made afterwards.<sup>4</sup> And there is no fixed rule barring preferential

*v. East & West R. Co.*, 46 Fed. Rep. 101. But see the following section. “If current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has thus been improperly applied to their use.” *Burnham v. Bowen*, 111 U. S. 776, 783; s. c., 4 S. Ct. Rep. 675.

<sup>1</sup> *Farmers' L. & T. Co. v. Kansas City &c. R. Co.*, 53 Fed. Rep. 182, 185; *Kneeland v. Luce*, 141 U. S. 491, 509; s. c., 12 S. Ct. Rep. 32; *Kent v. Iron Co.*, 144 U. S. 75; s. c., 12 S. Ct. Rep. 650. See, also, *Elwell v. Fosdick*, 184 U. S. 500, 512; s. c., 10 S. Ct. Rep. 598. In the case first cited (53 Fed. Rep., at p. 189) Judge Caldwell said it was immaterial whether such a condition precedent provided for the payment of claims which were not “preferential debts” within the general rule on the subject.

<sup>2</sup> *Farmers' L. & T. Co. v. Kansas*

*City &c. R. Co.*, 53 Fed. Rep. 182, 187. See *Insurance Co. v. Heiss* (Ill.), 31 N. E. Rep. 188; *Beach on Receivers*, §§ 366-378; *Rabt v. Attrill*, 106 N. Y. 423; *F. N. & T. Co. v. Pine Bluff &c. Ry. Co.* (Tenn.), 21 S. W. Rep. 658.

<sup>3</sup> *Farmers' L. & T. Co. v. Kansas City &c. R. Co.*, 53 Fed. Rep. 182, 189; *Miltenerberger v. Railway Co.*, 106 U. S. 286, 311, 312; s. c., 1 S. Ct. Rep. 140; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 457, 468; s. c., 6 S. Ct. Rep. 809; *Thomas v. Railway Co.*, 86 Fed. Rep. 808.

<sup>4</sup> *Farmers' L. & T. Co. v. Kansas City &c. R. Co.*, 53 Fed. Rep. 182, 189; *Central Trust Co. v. St. Louis &c. Ry. Co.*, 41 Fed. Rep. 551; *Fosdick v. Schall*, 99 U. S. 285; *Blair v. Railroad Co.*, 36 Fed. Rep. 471. It was said in the case first cited that where payment is made a condition it would be binding although not confined to “preferential debts.” (53 Fed. Rep. 189.)

debts contracted more than six months before the appointment of the receiver.<sup>1</sup>

§ 736. **Advice to receivers.**—Receivers can have general advice and instructions, and in particular cases particular advice and instructions on application to the court. If there are parties in interest and they have their day in court, the advice may be decisive; but, if the matter is *ex parte*, such advice is binding only on the receiver, for the judge may change his mind on hearing full argument.<sup>2</sup> A receiver appointed to take charge of property pending foreclosure proceedings may, on his own motion, apply to the court for

<sup>1</sup> *Farmers' L. & T. Co. v. Kansas City & R. Co.*, 58 Fed. Rep. 182, 187. In *Hale v. Frost*, 99 U. S. 389, the court gave priority to a claim for materials furnished three years before the appointment of the receiver. In *Burnham v. Bowen*, 111 U. S. 776; s. c., 4 S. Ct. Rep. 675, priority was given to a claim for coal supplied eleven months before the appointment. In *Atkins v. Railroad Co.*, 8 Hughes, 807, the claim was twenty-two months old. There are cases in the State courts also where priority has been given to debts contracted more than six months before the appointment. See note to *Blair v. Railway Co.*, 22 Fed. Rep. 471, 475, 478, and the note to *Farmers' L. & T. Co. v. Kansas City & R. Co.*, *supra*, and especially *Insurance Co. v. Heiss* (Ill.), 81 N. E. Rep. 188. See, also, *Central Trust Co. v. St. Louis & R. Ry. Co.*, 41 Fed. Rep. 551; *Central Trust Co. v. Wabash & R. Ry. Co.*, 80 Fed. Rep. 882, 884, allowing preferential debts to an amount exceeding \$3,000,000, in a suit brought by the mortgagor and an appointment of receiver upon his petition, without the assent of the mortgagees, the debts being for borrowed money which accrued "within the last two years." *Farmers' L. & T. Co. v.*

*Kansas City & R. Co.*, *supra*, debts for labor, material and supplies. In *Blair v. Railway Co.*, 22 Fed. Rep. 474, Judge Brewer said "it should be only such reasonable time as in the nature of things, and in the ordinary course of business, would be sufficient to have claims settled and paid." But the general rule has been not to charge the income of mortgaged property accruing during a receivership, or the proceeds of the sale of such property, with general debts for labor, supplies and equipment, back of the six months immediately preceding the appointment of a receiver. *Thomas v. Peoria & R. Co.*, 36 Fed. Rep. 808; s. c., 36 Am. & Eng. R. Cas. 381; *Fosdick v. Schall*, 99 U. S. 285; *Turner v. Indianapolis & R. Co.*, 8 Biss. 315; *Union Trust Co. v. Illinois & R. Co.*, 117 U. S. 484. Five months was fixed in *Taylor v. Phila. & R. Co.*, 7 Fed. Rep. 877, and three months in *Miltenberger v. Logansport R. Co.*, 106 U. S. 286.

<sup>2</sup> *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, 81 Fed. Rep. 862. See, also, *Central Trust Co. v. Wabash & R. Ry. Co.*, 28 Fed. Rep. 863, 867; *Ex parte Chamberlain*, 55 Fed. Rep. 704, 706; *Ex parte Koehler*, 28 Fed. Rep. 529; *Frank v. Denver & R. Ry. Co.*, 28 Fed. Rep. 757, 764.

directions in regard to the expenditure of funds in his hands as receiver.<sup>1</sup> Where the property of a railway is being administered by a receiver, it is competent for the court to adjust difficulties between him and his employees which, in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership; and the court, in the interest of public order and for the protection of the property under its control, can direct a suitable arrangement with its employees or officers to provide compensation and conditions of their employment, and to avoid an interruption of their labor, which will be disastrous to the trust and injurious to the public.<sup>2</sup> The court will not authorize a receiver to compound the statutory liability of parties to the trust fund where it appears that they have fraudulently transferred their property to avoid their obligations.<sup>3</sup> The court may authorize a receiver to pay wages to an employee during his recovery from injuries received for which the receiver is not responsible, where such a course is supported by good policy.<sup>4</sup> A receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands beyond what is absolutely essential to its preservation and use as contemplated by his appointment.<sup>5</sup>

<sup>1</sup> *Grant v. Phoenix Mut. L. Ins. Co.*, 121 U. S. 118.

<sup>2</sup> *Waterhouse v. Comer*, 55 Fed. Rep. 149.

<sup>3</sup> *In re Certain Stockholders*, 53 Fed. Rep. 38, 41, where Ross, C. J., commenting on a proposition for compromise under such circumstances, said — "It is far better that the entire amount of the obligations in question should be lost to the trust fund than that the slightest judicial countenance should be given the proposed proceedings."

<sup>4</sup> *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, 83 Fed. Rep. 701.

<sup>5</sup> *Cowdrey v. Galveston & C. R. Co.*, 98 U. S. 352. Where a receiver shows that he has among the assets of his assignor shares of stock of a corpo-

ration, and that such shares are in immediate danger of becoming valueless by the inability of the corporation to pay its working expenses, the court may authorize the receiver to advance money to such corporation, taking security therefor, to enable it to continue its business. *Kalbfleisch v. Kalbfleisch*, 13 N. Y. Supl. 897. When an insolvent railroad is operated under the powers conferred by statute, the court may control its operation, and the chancellor may personally direct or make contracts for that purpose, or he may confer a discretionary authority to make such contracts upon the receiver. *Vanderbilt v. Central R. Co.*, 48 N. J. Eq. 669.

§ 737. **Protection to receivers.**—A court will protect its receiver in the possession and use of franchises and property committed to him.<sup>1</sup> Striking employees of a railroad receiver are guilty of contempt of court if they combine and conspire to cripple or embarrass the operation of the road.<sup>2</sup> Property in the hands of a receiver of any court either of a State or of the United States is as much bound for the payment of taxes, State, county and municipal, as any other property, and the court will not interfere to protect the receiver if he attempts to escape from such payment.<sup>3</sup> On the other hand, a receiver is not bound to pay a tax in his judgment unlawful without the order of the court; and when he considers the legality of the tax questionable, it is his manifest duty to apply to the court for instruction or protection.<sup>4</sup>

§ 738. **Compensation of receivers.**—Courts of equity may, in the absence of statutory rule, fix the compensation of their own receivers and that of counsel employed by them.<sup>5</sup> In

<sup>1</sup> Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. Rep. 687.

<sup>2</sup> *In re Higgins*, 27 Fed. Rep. 443. See, also, *Secor v. Toledo & C. R. Co.*, 7 Biss. 518; *King v. Ohio & C. Ry. Co.*, 7 Biss. 529; *United States v. Kane*, 23 Fed. Rep. 748; *In re Doolittle*, 23 Fed. Rep. 544.

<sup>3</sup> *Ex parte Chamberlain*, 55 Fed. Rep. 704.

<sup>4</sup> *Ex parte Chamberlain*, 55 Fed. Rep. 704, 706, examining the following cases where the receiver was driven to seek the protection of the court in the matter of taxation:—*Central Trust Co. v. Wabash & C. Ry. Co.*, 26 Fed. Rep. 1; *Hewitt v. Railroad Co.*, 12 Blatchf. 452; *Stevens v. Railroad Co.*, 12 Blatchf. 104; *Georgia v. Atlantic & C. R. Co.*, 3 Woods, 437; *County of Yuba v. Adams*, 7 Cal. 35; *Prince George's Co. v. Clarke*, 86 Md. 206,—and affirming the right of the federal court to enjoin State officers from seizing property in the hands

of the receiver. See, also, on the last point, *King v. Wooten*, 54 Fed. Rep. 612. In *Ex parte Chamberlain*, *supra*, it was further held that it was not necessary for the State, in order to obtain payment of taxes, to come into court by petition; but when it seized and asserted exclusive possession of the property in the hands of the receiver, the court would order its restoration to the receiver until the validity of the tax should be determined in direct proceedings. See, also, *Ex parte Huidekoper*, 55 Fed. Rep. 709.

<sup>5</sup> *Stuart v. Boulware*, 133 U. S. 78, 81; *Gardiner v. Tyler*, 3 Keyes, 506, 508; *Magee v. Cowperthwaite*, 10 Ala. 966; *Stretch v. Gowdey*, 3 Tenn. Ch. 565; *Baldwin v. Eazler*, 84 N. Y. Super. Ct. 275; *Beach on Receivers*, § 758. Where the court fixes the compensation in advance in the form of a salary it may make an additional allowance if the facts subsequently seem to justify such a course. *Farm-*

some of the United States cases the analogy of the statute respecting compensation to executors, administrators, guardians or other trustees is followed;<sup>1</sup> in others the matter is held to be wholly within the discretion of the court;<sup>2</sup> while still

ers' *L. & T. Co. v. Central R. Co.*, 8 Fed. Rep. 60. It is not improper to allow the receiver compensation from time to time before the close of his receivership, instead of requiring him to wait until the end of his service. *Special Bank Comm'rs v. Franklin Sav. Inst.*, 11 R. I. 557. *Cf.* dissenting opinion of Stiles, J., in *Thompson v. Huron Lumber Co.* (Wash. St.), 82 Pac. Rep. 586.

<sup>1</sup>*Gardiner v. Tyler*, 3 Keyes, 505, 508; *Holcombe v. Holcombe*, 18 N. J. Eq. 415, 417; *Magee v. Cowperthwaite*, 10 Ala. 966. In New York the code provides that the compensation of receivers, unless otherwise specially prescribed by statute, shall not exceed five per centum upon the sums received and disbursed by him. New York Code of Civ. Proc., § 3820. See, also, Code of Proc., § 244; N. Y. Laws of 1879, ch. 443; Laws of 1842, ch. 3, § 2a. In New York compensation is awarded at the same rate as to executors when the case does not fall within the statutes. *Howes v. Davis*, 4 Abb. Pr. 71; *Bennett v. Chapin*, 3 Sandf. 678; *Mullir v. Pondir*, 6 Lans. (N. Y.) 481. See *In re Kellogg*, 7 Paige, 265. In Maryland it is the established rule that the compensation of receivers is regulated by analogy as near as possible to the commissions allowed to guardians and trustees for the performance of like services or kindred services. *Tome v. King*, 64 Md. 166. In *Thompson v. Huron Lumber Co.* (Wash. St.), 82 Pac. Rep. 586, the court said that "In such cases it would be proper for the court to be governed to some extent by the compensation allowed to

administrators and executors. In arriving at the compensation to be paid the receiver, the responsibilities assumed and the skill and labor expended should be taken into consideration and the remuneration fixed upon the prices usually paid for similar services. The compensation should be fair in view of the facts in each case, and no positive rule can be laid down to govern in arriving at its determination."

<sup>2</sup>In the federal courts the compensation allowed to receivers and their counsel is usually determined according to the circumstances and is a mere question of reasonableness. *Stuart v. Boulware*, 138 U. S. 78, 81; *Cowdrey v. Railroad Co.*, 1 Woods, 831, 845, 846; *Central Trust Co. v. Wabash & c. Ry. Co.*, 32 Fed. Rep. 187, 188. "The amount of compensation is graduated somewhat by the duties and somewhat by the responsibilities of the situation." Per Bradley, J., in *Cowdrey v. Railroad Co.*, 1 Woods, 831, 845, 846. A commission of five per cent. upon disbursements and receipts is not unusual where large sums are not involved. *Cowdrey v. Railroad Co.*, 1 Woods, 831, 846. But where the amounts are large a salary or lump sum may be awarded. *Central Trust Co. v. Wabash & c. Ry. Co.*, 32 Fed. Rep. 187, 188; *Cowdrey v. Railroad Co.*, 1 Woods, 831, 846; *Farmers' L. & T. Co. v. Central Railroad*, 8 Fed. Rep. 60; *Hinckley v. Railroad Co.*, 100 U. S. 153; *Easton v. Houston & c. Ry. Co.*, 40 Fed. Rep. 189. "The question of allowance is a judicial one, and while, as it is said, the matter is left to the



others accurately fix by statute the receiver's compensation at a certain per centum of the amount of money passing through his hands.<sup>1</sup> Whatever rate of compensation may be allowed the order making the allowance should be definite, that it may not be doubtful on what basis or for what services the particular allowance is made.<sup>2</sup>

discretion of the court, it is discretionary only in the sense that there are no fixed rules to determine the proper allowance, and is not discretionary in the sense that the courts are at liberty to give something more than a fair and reasonable compensation." Per Brewer, J., in *Central Trust Co. v. Wabash & C. Ry. Co.*, 32 Fed. Rep. 188. In Massachusetts the compensation is such as is reasonable for the services rendered by a person competent to perform the duty rather than any fixed commission, and ought not to be calculated upon the rate of profit in the specific business in the hands of the receiver, nor in reference to the especial fitness of the receiver to perform the services. *Jones v. Keene*, 115 Mass. 170; *Grant v. Bryant*, 101 Mass. 567. A similar rule prevails in Rhode Island, *Special Bank Comm'rs v. Franklin Institution &c.*, 11 R. I. 557; and in Maryland, *Abbott v. Baltimore & Rappahannock Steam Packet Co.*, 4 Md. Ch. 810; and in Iowa, *French v. Gifford*, 31 Iowa, 148. In Mississippi, also, "the reasonableness of the compensation is matter exclusively for the determination of the court." *Lichtenstein v. Dial*, 68 Miss. 54, allowing four per cent. upon the inventory and sale of a jewelry stock of \$11,000. See, also, *United States v. Church of Jesus Christ*, 6 Utah, 9, 69; s. c., 21 Pac. Rep. 516; *Greeley v. Provident Sav. Bank (Mo.)*, 15 S. W. Rep. 429; *In re Louisiana Sav. Bank &c. Co.*, 40 La. Ann. 514; *Kerlin v. Ewen (Pa.)*, 24 Atl. Rep. 127. In England the

amount is determined upon each occasion by "what is fit or proper to be allowed, having regard to the degree of difficulty or facility experienced by the receiver." *Day v. Croft*, 2 Beav. 491; *Malcolm v. O'Callaghan*, 8 Myl. & C. 52; *Potts v. Leighton*, 15 Ves. 276; *In re Montgomery*, 1 Moll. 419; *Bristowe v. Needham*, 2 Ph. 190; *Conrad v. Hanmer*, 9 Beav. 8; *In re Ormsby*, 1 Ball. & B. 189.

<sup>1</sup> *Price v. White*, 1 Bailey Eq. (S. C.) 240, holding that the receiver is entitled to the statutory commission irrespective of reasonableness in the particular case. See, also, *Massey v. Massey*, 1 Cheves (S. C.), 159. Where the statute allows commissions for receipts and disbursements, the receiver is allowed half commissions for either receiving or disbursing. *Matter of Bank of Niagara*, 6 Paige, 218; *Hawes v. Davis*, 4 Abb. Pr. 71; *Matter of Roberts*, 3 Johns. Ch. 48. See, further, for the manner of computing commissions under various circumstances, *Bennett v. Chapin*, 8 Sandf. Super. Ct. 673; *Matter of Kellogg*, 7 Paige, 265; *Matter of Woven Tape Skirt Co.*, 85 N. Y. 506; *Van Buren v. Chenango County Mut. Ins. Co.*, 12 Barb. 671, 676; *People v. Mutual Benefit Ass'n*, 39 Hun, 49; *Attorney-General v. Continental L. Ins. Co.*, 32 Hun, 323.

<sup>2</sup> *Tome v. King*, 64 Md. 166. Where a partner is receiver of a partnership he is not usually entitled to compensation in the absence of a stipulation to that effect. *Berry v. Jones*, 11 Heisk. 206; *Brien v. Harriman*, 1

§ 739. Compensation of railway receivers.—In the federal courts, where the compensation of receivers is not governed by statute, the allowances to receivers of railways are somewhat more liberal than in the case of other receiverships.<sup>1</sup> Such receivers have been frequently allowed as much as \$10,000 a year.<sup>2</sup>

Tenn. Ch. 467. And where a receiver has been guilty of negligence or misconduct in the management of the property, the court may reduce his compensation, and may also impose a penalty in the shape of a further reduction on that account. *Harrison v. Boydell*, 6 Sim. 211; *Rex v. Lidwell*, 1 D. & W. 26; *In re Commonwealth L. Ins. Co.*, 82 Hun (N. Y.), 78. Though a receivership occupied the entire time of the receiver, was complicated, involved the settlement of accounts, the operating of a saw-mill for several months, the selling of lumber and a stock of merchandise, and looking after certain litigation, and the receiver gave a bond for \$25,000, and discharged his duties faithfully, \$300 a month is a sufficient allowance. *Thompson v. Huron Lumber Co.* (Wash. St.), 82 Pac. Rep. 536. Where the total receipts of a receivership were about \$95,000, and the bulk of the work was done in the first six months, during which clerks are employed, and the receiver gave only a part of his time, a compensation of \$3,000 for the first year and \$1,000 subsequently was held sufficient for the receiver. *Schwartz v. Keystone Oil Co.* (Pa.), 25 Atl. Rep. 1018. New York Code of Civil Procedure, section 3320, provides that receivers shall be entitled to such commissions, not exceeding five per cent. on the sum received and disbursed by them, as the court or judge appointing them may allow; and Laws of 1883, chapter 878, section 2, provides that receivers shall be al-

lowed five per cent. on the first \$100,000, and half that rate on the excess. It was held that courts have no right to allow a receiver's commission in excess of five per cent. of the sums passing through their hands. *In re Orient Mut. Ins. Co.*, 21 N. Y. Supl. 237.

<sup>1</sup> *Beach on Receivers*, § 767. He may be justly entitled to more than the chief officer of the same road would have a right to claim. *Cowdrey v. Railroad Co.*, 1 Woods, 831, 847; *Central Trust Co. v. Wabash & C. Ry. Co.*, 82 Fed. Rep. 187, 188. See, also, *McArthur v. Montclair R. Co.*, 27 N. J. Eq. 77.

<sup>2</sup> *Foster's Federal Practice* (2d ed.), § 258, citing *Hinckley v. Railroad Co.*, 100 U. S. 158; *Cowdrey v. Railroad Co.*, 1 Woods, 831, 847. But see *Farmers' L. & T. Co. v. Central R. Co.*, 8 Fed. Rep. 60. In *Eastern v. Houston & T. C. Ry. Co.*, 40 Fed. Rep. 189, \$4,500 a year to each of two receivers was considered adequate. The receivers of a railway company received and paid out during their trust about \$80,000,000. At the time of their appointment the mileage was about three thousand six hundred miles, and the property consisted of thirty or forty different roads, all heavily mortgaged. There was about \$4,000,000 of floating and pressing debts resting upon the company, and its credit was gone. On their personal guaranty the receivers obtained money to satisfy most of the pressing claims, the aggregate sum thus advanced amounting to

§ 740. **Extra compensation.**—As a general rule the receiver is not entitled to anything for his labor in addition to the regular compensation.<sup>1</sup> Thus a receiver will not be allowed extra compensation for services and expenses incurred by him in making journeys to a foreign country for the purpose of prosecuting legal proceedings to recover money due the estate, when such journeys have not been expressly authorized by the court, even though authorized and approved by many of the parties interested in the estate.<sup>2</sup> But in case the duties of a receiver prove to be more arduous than he or the court expected, or in case he performs duties in addition to those ordinarily required of a receiver, it has been held that in either case, provided he has faithfully administered his trust without intentional error or fraud, he is entitled to compensation in addition to that fixed by the order under which he was appointed.<sup>3</sup> As the necessity of employing counsel and the payment of proper fees for such services requires the exercise of a sound discretion on the part of the receiver, the court will not allow a receiver compensation for legal services rendered by himself.<sup>4</sup>

\$22,000,000. Considering their successful administration for two years and a half and its felicitous outcome, it was held that \$70,000 for each of the receivers was a just and fair compensation for the services actually rendered. *Central Trust Co. v. Wabash & C. Ry. Co.*, 32 Fed. Rep. 187.

<sup>1</sup> *Beach on Receivers*, § 769; *Hynes v. McDermott*, 3 N. Y. St. Rep. 582, 585; *In re Ormsby*, 1 Ball & B. 189; *Malcolm v. O'Callaghan*, 8 Myl. & C. 52; *Vanderheyden v. Vanderheyden*, 2 Paige, 287; *In re Bank of Niagara*, 6 Paige, 216; *Easton v. Houston & C. R. Co.*, 40 Fed. Rep. 189.

<sup>2</sup> *Malcolm v. O'Callaghan*, 8 Myl. & C. 152.

<sup>3</sup> *Farmers' L. & T. Co. v. Central R. Co.*, 8 Fed. Rep. 818; s. c., 8 Fed. Rep. 60. See, also, *Adams v. Haskell*, 6 Cal. 475; *Williamson v. Wilson*, 1 Bland (Md.), 433; *Bristome v. Needham*, 2

Ph. 190; *Pott v. Leighton*, 15 Vea. 276; *Courand v. Hanmer*, 9 Beav. 8. Where a receiver uses moneys in his hands without the previous orders of the court, the amount so expended may be allowed to him if he has acted in good faith and for the benefit of the parties. *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287.

<sup>4</sup> *Matter of the Bank of Niagara*, 6 Paige, 218; *Beach on Receivers*, § 770; *State v. Butler*, 15 Lea, 118. See, also, *Battaille v. Fisher*, 36 Miss. 321. *Cf. Farmers' L. T. Co. v. Central R. Co.*, 2 McCrary, 318; s. c., 8 Fed. Rep. 64. Though a receiver may, under certain circumstances, employ counsel to advise him with regard to the property in his charge, the necessity must be clearly apparent, or a claim for attorneys' fees will be disallowed. *Terry v. Martin* (N. M.), 32 Pac. Rep. 157. A master in chancery acting as receiver is entitled only to the com-

§ 741. Appeals from allowances for services.—It is well settled that an order granting or refusing an allowance to a receiver for his services is appealable, both upon the part of the receiver and of the parties to the cause.<sup>1</sup> Where the quantum of the compensation allowed a receiver is questioned in an appellate court, great weight is accorded the judgment of the lower court, upon the theory that such court was more thoroughly conversant with the facts, owing to the same having been more fully presented before that tribunal.<sup>2</sup> Nevertheless, the appellate court will in a clear case reduce the amount of compensation allowed by the court below.<sup>3</sup> It was said in a recent case in Illinois that the general rule that a reviewing court will not interfere with the order of the court below unless there has been an abuse of discretion ob-

pensation of a receiver. *Arthur v. Master in Equity*, 1 Harp. Eq. (S. C.) 47. Where the employment of counsel is proper and necessary, counsel fees may be allowed to the receiver. *Cowdrey v. Railroad Co.*, 1 Woods, 389; *Bennett v. Chapin*, 8 Sandf. (N. Y.) 673; *Howes v. Davis*, 4 Abb. Pr. (N. Y.) 71; *Stuart v. Boulware*, 133 U. S. 78; *United States v. Church of Jesus Christ (Utah)*, 21 Pac. Rep. 516. Otherwise where the proceedings are unauthorized and improper or unnecessary. *In re Union Bank*, 37 N. J. Eq. 420; *Corey v. Long*, 43 How. Pr. 506; *O'Mahoney v. Belmont*, 37 N. Y. Super. Ct. 223. A receiver upon the passing of his accounts is not entitled to an allowance out of the fund in his hands for counsel fees on an unsuccessful defense to a suit brought against him by the owner of such fund, nor for expenses for an unsuccessful appeal brought by him from the decree in such suit. *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 573. An allowance of counsel fees on behalf of a receiver is made to the receiver, and not to the counsel. *Stuart v. Boulware*, 133 U. S. 78. When counsel are employed by a receiver the

court will determine the amount to be allowed them for their services. *Walsh v. Raymond*, 58 Conn. 251.

<sup>1</sup> *Beach on Receivers*, § 774; *Tompson v. Huron Lumber Co.* (Wash. St.), 32 Pac. Rep. 536; *Magee v. Cowperthwaite*, 10 Ala. 966; *Herndon v. Hurter*, 19 Fla. 406. *Cf. Adams v. Woods*, 8 Cal. 306.

<sup>2</sup> *Greeley v. Provident Sav. Bank (Mo.)*, 15 S. W. Rep. 429, 431, where this point stood out with great prominence; *Morgan v. Hardee*, 71 Ga. 741; *Stuart v. Boulware*, 133 U. S. 78, 82; *Hinckley v. Railroad Co.*, 100 U. S. 153; *Hembree v. Dawson*, 18 Oreg. 474; *Beach on Receivers*, § 774. Where the master reports that the compensation allowed the receiver is fair and reasonable, and his finding is sustained by the testimony of competent and experienced men, it will not be disturbed. *Karn v. Rorer Iron Co.*, 86 Va. 754; s. c., 11 S. E. Rep. 431. The compensation will seldom, if ever, be increased upon appeal. *Hinckley v. Railroad Co.*, *supra*; *Stuart v. Boulware*, *supra*.

<sup>3</sup> *Martin v. Martin*, 14 Oreg. 165; *Williams v. Morgan*, 111 U. S. 684, 700.

tains only where the latter court acted upon evidence from an examination of which the reviewing court can determine whether there was an abuse of discretion, and that the facts must appear in the record.<sup>1</sup>

**§ 742. Suits by receivers — Leave of court.**— It is well settled that as a general rule a receiver cannot bring any suit without leave of the court which appointed him is first obtained.<sup>2</sup> It is customary to give the receiver, in the order by which he is appointed, a general leave to bring suits for the collection of the assets and for obtaining possession of the property over which he is to have charge;<sup>3</sup> and if the order of appointment does not contain such authority<sup>4</sup> it may be

<sup>1</sup> *Heffron v. Rice*, 40 Ill. App. 244, 257, citing *Pankey v. Raum*, 51 Ill. 88; *Wilhite v. Pearce*, 47 Ill. 413; *Grob v. Cushman*, 45 Ill. 119; *Becker v. Becker*, 11 Ill. App. 247.

<sup>2</sup> *Wynn v. Lord Newborough*, 3 Bro. C. C. 88; *Swaby v. Dickon*, 5 Sim. 629; *Green v. Winter*, 1 Johns. Ch. 60; *Ward v. Swift*, 6 Hare, 813; *Davis, Adm'r, v. Snead*, 38 Gratt. 705, 710; *Merritt v. Lyon*, 16 Wend. 405, 410; *Martin v. Atchison (Idaho)*, 33 Pac. Rep. 47; *Wayne Pike Co. v. State (Ind.)*, 34 N. E. Rep. 440; *Barton v. Barbour*, 104 U. S. 126; *Battle v. Davis*, 66 N. C. 252; *Pitt v. Snowdon*, 3 Atk. 750; *Screven v. Clark*, 48 Ga. 41; *Keen v. Breckenridge*, 96 Ind. 69; *Garver v. Kent*, 70 Ind. 428; *Moriarity v. Kent*, 71 Ind. 601; *Herron v. Vance*, 17 Ind. 595; *Car Works Co. v. Ellis*, 118 Ind. 215; *Davis v. Creamery Co.*, 128 Ind. 222; *Anonymous*, 6 Ves. 287; *Booth v. Clark*, 17 How. 331; *Green v. Winter*, 1 Johns. Ch. 60; *Reynolds v. Pettijohn*, 79 Ga. 327; *Patrick v. Eells*, 30 Kan. 680; *Alexander v. Relfe*, 9 Mo. App. 183; *Glenn v. Busey*, 5 Mackey (D. C.), 238; *Fichtenkamm v. Gambs*, 68 Mo. 289. But leave may be presumed; as where a receiver brought suit in the court by which he was appointed,

and prosecuted the same with its sanction, it was considered unnecessary for him to produce an express order authorizing him to sue.

<sup>3</sup> *Beach on Receivers*, § 651; *High on Receivers*, § 208. The receiver's general authority to collect and keep the assets is not sufficient to justify him in bringing an action. *Daniell's Ch. Pr. 1988 et seq.* When the order of appointment provided that the receiver "is hereby ordered to collect immediately all said property together, and hold the same subject to the further order of the court," it was held insufficient to authorize him to bring suit. *Screven v. Clark*, 48 Ga. 41. *Cf. Everett v. State*, 28 Md. 190. Where, in a suit against administrators, a sum of money is directed to be paid by them to the general receiver of the court, and a common-law execution is directed to issue in favor of the receiver, and the receiver is directed, if the same is not paid, to enforce it against the administrators and the sureties on their bond, the direction is sufficient to authorize the receiver to sue the administrators and their sureties to collect the amount decreed him. *Elliot v. Trahern (West Va.)*, 14 S. E. Rep. 223.

conferred by a subsequent order.<sup>1</sup> In actions brought by receivers they occupy substantially the same position as the original parties over whose estate they were appointed, and any defense which might have been made against the original party is equally available against the receiver.<sup>2</sup> The receiver's authority to sue must be exercised according to the appropriate remedies, legal or equitable, as the case may be; he cannot convert remedies from legal to equitable, or otherwise change the established methods of procedure.<sup>3</sup> After entering upon the litigation he has all the freedom of action of any other person, subject to the supervision of the court, while acting within the scope of his authority;<sup>4</sup> and he has a right to appeal from a decision which is adverse to him.<sup>5</sup>

<sup>1</sup> *Lathrop v. Knapp*, 87 Wis. 307.

<sup>2</sup> *Litchfield Bank v. Peck*, 29 Conn. 387. See, also, *Jacobson v. Allen*, 12 Fed. Rep. 454.

<sup>3</sup> *Beach on Receivers*, § 665; *Freeman v. Winchester*, 18 Miss. 577; *Receiver v. First National Bank*, 84 N. J. Eq. 450, where the receiver began a proceeding by petition to recover moneys of the bank received by one of its creditors subsequent to the appointment of the receiver, but the court held that the receiver could have no relief by petition, but must proceed by bill; *Conley v. Deere*, 11 Lea (Tenn.), 275; *In re Castle*, 41 Hun, 637; *Andrews v. Paschen*, 67 Wis. 43. Where a receiver is appointed to take charge of the estate of a debtor pending proceedings upon a creditors' bill filed against the debtor for discovery under the New Jersey statutes, such receiver, while he may have a concurrent remedy at law, may also file a bill in the court of chancery, and prosecute the same for the collection of money which he claims is held in trust for the debtor, making the person alleged to hold the money defendant in the bill. *Terhune v. Bell* (N. J.), 9 Atl. Rep. 111. In *Attorney-General v.*

*Guardian Mut. L. Ins. Co.*, 77 N. Y. 272, 275, *Andrews, J.*, said:—"It is the settled doctrine that the receiver of an insolvent corporation represents not only the corporation but also creditors and stockholders, and that in his character as trustee for the latter he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its agents or officers, or to recover its funds or securities invested or misapplied."

<sup>4</sup> *Beach on Receivers*, § 666; *Devendorf v. Dickinson*, 21 How. Pr. 275. See *Van Dyck v. McQuade*, 85 N. Y. 616; *McEvers v. Lawrence*, *Hoffman's Ch. Rep.* 173; *Reeder v. Seely*, 4 Cowen, 548; *St. John v. Denison*, 9 How. Pr. 343.

<sup>5</sup> *Devendorf v. Dickinson*, 21 How. Pr. 275. A receiver may maintain a suit to interplead between two claimants to the same fund in his hands, and meantime may render his accounts and pay the balance into court to await the determination of the action. *Winfield v. Bacon*, 24 Barb. 154. The omission to take an oath of office as required by statute does not defeat his suit. *Dayton v. Borst*,

§ 743. The same subject continued — Parties and pleading.— Some authorities hold that unless a receiver is expressly authorized to sue in his own name,<sup>1</sup> or unless the legal title has been formally assigned to him, he cannot, although authorized to prosecute a cause of action belonging to the party whose estate he holds, use his own name as plaintiff, but must use that of him to whom the right originally belonged.<sup>2</sup> Al-

7 Bosw. 115. As to the effect of a failure to give a bond or of informalities therein, see § 726, *supra*.

<sup>1</sup> The statutes of many of the States expressly or impliedly authorize a proceeding in the name of the receiver. See 20 Amer. & Eng. Encyc. of Law, p. 284, note; Terry v. Bamberger, 44 Conn. 558; Cooke v. Orange, 48 Conn. 401; Nathan v. Whitlock, 9 Paige, 152; Palmer v. Murray, 10 How. Pr. 545; Sheldon v. Adams, 41 Barb. 54; Gillet v. Fairchild, 4 Denio (N. Y.), 80; Miami Exporting Co. v. Gano, 18 Ohio, 269; Renick v. Bank, 18 Ohio, 298; s. c., 42 Am. Dec. 208; Alexander v. Relfe, 9 Mo. App. 183; Gill v. Balis, 72 Mo. 424. Where the statute provides that actions may be brought in the name of the party over whom the receiver is appointed, "or otherwise," the receiver may proceed in his own name. Manlove v. Burger, 88 Ind. 211; Garver v. Kent, 70 Ind. 428; Frank v. Morrison, 58 Md. 428; Hayes v. Brotzman, 46 Md. 519; Boyd v. Royal Ins. Co. (N. C.), 16 S. E. Rep. 899. That the court appointing the receiver has power to authorize him to sue in his own name, see Beach on Receivers, § 688; High on Receivers (3d ed.), § 209; Gluck & Becker on Receivers & Corporations, pp. 155, 166; Harland v. Bankers' & Merchants' Tel. Co., 88 Fed. Rep. 199; Davis v. Gray, 6 Wall. 203; Frankle v. Jackson, 30 Fed. Rep. 398; King v. Cutts, 24 Wis. 627; Hardwick v. Hook, 7 Ga. 354; Manlove v. Burger, 88 Ind. 211; Leonard v. Storrs, 81

Ala. 488. But see Alexander v. Relfe, 9 Mo. App. 183. In an action to enforce the statutory liability of stockholders in a corporation, a receiver may be appointed to collect and distribute the fund, and may, by authority of the court appointing him, prosecute actions in his own name as receiver to enforce payment of judgments rendered for such statutory liability. Zieverink v. Kemper (Ohio), 34 N. E. Rep. 250.

<sup>2</sup> Dick v. Struthers, 25 Fed. Rep. 108; Dick v. Oil Well Supply Co., 25 Fed. Rep. 105; Pouder v. Catterson, 127 Ind. 484; Yeager v. Wallace, 44 Pa. St. 294; St. Louis & Co. Coal Co. v. Sandoval Coal & Co., 111 Ill. 82; Battle v. Davis, 66 N. C. 252; Manlove v. Burger, 88 Ind. 211; Booth v. Clark, 17 How. 881; Ingersoll v. Cooper, 5 Blatchf. 426; Newell v. Fisher, 24 Miss. 392; Graydon v. Church, 7 Mich. 36; State v. Wilmer, 65 Md. 178; Harrell v. Kent, 71 Ind. 602; Moriarity v. Kent, 71 Ind. 601; Garver v. Kent, 70 Ind. 428; Justice v. Kirlin, 17 Ind. 588; King v. Cutts, 24 Wis. 627; Freeman v. Winchester, 10 Sm. & M. (Miss.) 577. The receiver of a corporation appointed by a court of equity cannot sue in his own name to recover property of the corporation which has never been in his possession nor been assigned to him, where authority to bring such suit has not been conferred on him by statute or by decree of court. Wilsor v. Welch (Mass.), 81 N. E. Rep. 712.

thought the weight of authority is in favor of the foregoing rule, it is stoutly maintained in several States that the contrary rule is sustained by the stronger reason, and that the receiver may by virtue of his appointment and general powers prosecute actions in his own name.<sup>1</sup> And, even where the first-

<sup>1</sup> *Mathis v. Pridham* (Tex.), 20 S. W. Rep. 1015; *Wray v. Jamison*, 10 Humph. (Tenn.) 186; *Helme v. Littlejohn*, 12 La. Ann. 298; *Baker v. Cooper*, 57 Me. 388; *Hardwick v. Hook*, 8 Ga. 354; *Beach on Receivers*, § 689; *Wilkinson v. Rutherford*, 49 N. J. Law, 241, where *Beasley, C. J.*, said:—"I cannot agree to the doctrine that a receiver is a mere custodian of the property of the person whom in certain respects he is made to supplant, and it would seem that he is an assignee of the assets within the scope of his office. There seems to be no reason why his power should not be held to be co-extensive with his functions; and it is clear that he cannot conveniently perform those functions unless upon the theory that some interest in the property, akin to that of an assignee's, passes to him. The receiver is to discharge the executory duty of collecting the debts, and taking into his possession, even against antagonistic claims, the tangible property; and after his appointment, a sale of such property by the insolvent would, it is presumed, be absolutely void; and yet, if the interest in the property thus transferred were not vested in the receiver, it would be difficult to find ground on which to invalidate the transaction. If no title resides in the receiver in disposing of property, he would be obliged to make sale in the name of the insolvent owner, and if the money that became due was not paid, to collect it by suit in the name of such owner; and yet, in the case of *Singerly v. Fox*, 75 Pa. St. 112, it was de-

cided that such an officer could sue in his own name for the purchase-money of an article sold by him in his official capacity. The inconvenience of requiring these agents of a court of equity to institute all actions in the name of the insolvent was exemplified in a case arising in the State of Maine; the question being whether the receivers of a bank could maintain in their own names an action to obtain possession of real estate to which the bank was entitled; the right to prosecute in the form adopted was upheld by the Supreme Court of that State, the circumstance being emphasized that the writ under a judgment, if obtained in the name of the bank, would require the officer executing it to put the bank, and not the receivers, in possession, which was not the object of the suit. *Baker v. Cooper*, 57 Me. 388. These embarrassments as well as many others of a like kind are obviated by the adoption of the doctrine that *virtute officii* a receiver becomes a provisional assignee of the property committed to him, and this doctrine is recognized in the case of *Harrison v. Maxwell*, 44 N. J. Law, 319. It will be observed that the theory thus approved attributes to a receiver of the kind in question only a limited power to institute actions in his own name, as he is supposed to have the power in this respect of an assignee, and nothing more. A chose in action that is not so transferable as to enable an assignee to sue for it in his own name is transmitted to a receiver subject to the same qualification."



mentioned doctrine obtains, a receiver may sue in his own name upon a contract made with him or upon an obligation due to him as such receiver.<sup>1</sup> A complaint filed by a receiver which fails to allege that leave of the court to institute or prosecute the action has been obtained, where such permission is essential, is fatally defective.<sup>2</sup> It is also necessary that he show by averments, in such form that issue may be joined thereon, his appointment by a court of competent jurisdiction in a case within its jurisdiction,<sup>3</sup> but the omission of such averment will be cured by verdict.<sup>4</sup>

<sup>1</sup> *Pouder v. Catterson*, 127 Ind. 434, a suit by a receiver against his lessees for rent; *Singerly v. Fox*, 75 Pa. St. 112, an action of trover, the conversion having taken place after the receivers had obtained possession. (It would have been otherwise had it occurred prior to his appointment. *Yeager v. Wallace*, 44 Pa. St. 294.) See, also, *Whitlesey v. Delaney*, 73 N. Y. 571, 578. The successors of a receiver who might sue in his own name may institute the suit in their own names. *Iglehart v. Bierce*, 86 Ill. 183.

<sup>2</sup> *Davis v. Talbut* (Ind.), 27 N. E. Rep. 496, where the suit was prosecuted in the name of a corporation by its receiver,—citing *Garver v. Kent*, 70 Ind. 428; *Moriarity v. Kent*, 71 Ind. 601; *Harrell v. Kent*, 71 Ind. 602; *Herron v. Vance*, 17 Ind. 595; *Coope v. Bowles*, 28 How. Pr. 10; *Keen v. Breckenridge*, 96 Ind. 69; *Wynn v. Lord Newborough*, 3 Bro. Ch. 88; *Green v. Winter*, 1 Johns. Ch. 60; *Ward v. Swift*, 6 Hare, 312; *In re Merritt*, 5 Paige, 125; *Merritt v. Merritt*, 16 Wend. 405; *Davis v. Snead*, 33 Gratt. 705; *Swaby v. Dickson*, 5 Sim. 629; *Battle v. Davis*, 66 N. C. 252; *Screven v. Clark*, 48 Ga. 41; *Glenn v. Busey*, 3 Cent. Rep. 233.

<sup>3</sup> *Beach on Receivers*, § 698; *Coope v. Bowles*, 42 Barb. 87; *Bangs v. McIntosh*, 23 Barb. 591; *Stewart v.*

*Beebe*, 23 Barb. 84; *White v. Low*, 7 Barb. 204; *Potter v. Merchants' Bank*, 28 N. Y. 641; *Rockwell v. Merwin*, 45 N. Y. 166; *Mauley v. Rassiga*, 13 Hun, 288; *White v. Joy*, 13 N. Y. 88; *Dayton v. Connah*, 18 How. Pr. 326; *Gillet v. Fairchild*, 4 Denio, 80. In proceedings before the surrogate by petition of the receiver of a beneficiary under a will to compel the executors to account, an allegation that the applicant was appointed receiver in a certain proceeding named is a sufficient averment of petitioner's title. *In re Beecher's Estate*, 19 N. Y. Supl. 971. An order appointing a receiver being *prima facie* evidence of the jurisdictional facts that it recites, allegations, in an action to recover rents and profits received and moneys expended by him, that he is acting as receiver "without any authority of this court or of law," and that "plaintiff was not a party, nor had he any notice of" his appointment, are insufficient to put in issue the jurisdiction to make the order. *Edee v. Strunk* (Neb.), 53 N. W. Rep. 70, and distinguishing *Johnson v. Powers*, 31 Neb. 292. See, also, *Potter v. Bank*, 28 N. Y. 641; *Wright v. Nostrand*, 99 N. Y. 45.

<sup>4</sup> *Griesel v. Schmal*, 55 Ind. 475. See, also, *Boland v. Whitman*, 33 Ind. 64.

§ 744. Suits against receivers — Leave of court.— It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained.<sup>1</sup> Suing a receiver without leave is a contempt of the

<sup>1</sup>Beach on Receivers, § 652; Porter v. Sabin, 149 U. S. 478; s. c., 18 S. Ct. Rep. 1008; Southern Express Co. v. Western &c. R. Co., 99 U. S. 191; Meeker v. Sprague (Wash.), 81 Pac. Rep. 628; Texas &c. Ry. Co. v. Cox, 145 U. S. 593, 601; Barton v. Barbour, 104 U. S. 126; Davis v. Gray, 6 Wall. 203; Kennedy v. Indianapolis &c. R. Co., 2 Flap. (U. S.) 704; s. c., 8 Fed. Rep. 97; Thompson v. Scott, 4 Dill. 508; Searle v. Choate, 25 Ch. Div. 728; Brooks v. Greathed, 3 J. & W. 176; Angel v. Smith, 9 Ves. 335; Randfield v. Randfield, 3 De G., F. & J. 766; De Groot v. Jay, 30 Barb. 483; Miller v. Loeb, 64 Barb. 454; Taylor v. Baldwin, 14 Abb. Pr. 166; Parker v. Browning, 8 Paige, 386; Melendy v. Barbour, 78 Va. 544; Meredith Vil. Sav. Bank v. Simpson, 22 Kan. 414; Keen v. Breckenridge, 96 Ind. 69; Henderson v. Walker, 55 Ga. 481; Graffenreid v. Brunswick &c. R. Co., 57 Ga. 22; Payne v. Baxter, 2 Tenn. Ch. 517; Heath v. Missouri &c. R. Co., 88 Mo. 617; Wray v. Hazlett, 6 Phila. 155; Vanderbilt v. Central R. Co., 48 N. J. Eq. 669; Little v. Dusenberry, 46 N. J. Law, 614. Though property is wrongfully in possession of a corporation, it cannot be replevied, without leave of court, after it comes into the possession of the receiver appointed in voluntary proceedings to dissolve the corporation. *In re Christian Jensen Co.*, 128 N. Y. 550; s. c., 28 N. E. Rep. 665. In *Barton v. Barbour*, 104 U. S. 126, Woods, J., said:—"The evident purpose of a suitor who brings his action against a receiver without leave is to obtain some advantage over the other claimants upon the assets in the receiver's

hands. The judgment, if he recovered one, would be against the defendant in his capacity of receiver, and the execution would run against the property in his hands as such. If he has the right in a distinct suit to prosecute his demand to judgment without leave of the court appointing the receiver, he would have the right to enforce satisfaction of it. By virtue of his judgment he could, unless restrained by injunction, seize upon the property of the trust or attach its credits. If his judgment were rendered outside the territorial jurisdiction of the court by which the receiver was appointed, he could do this, and the court which appointed the receiver and was administering the trust assets would be impotent to restrain him. The effect upon the property of the trust of any attempt to enforce satisfaction of his judgment would be precisely the same as if his suit had been brought for the purpose of taking the property from the possession of the receiver. A suit, therefore, brought without leave, to recover a judgment against a receiver for a money demand is virtually a suit, the purpose of which is, and the effect of which may be, to take the property of the trust from his hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property. We think, therefore, that it is immaterial whether the suit is brought against him to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained."

court appointing him,<sup>1</sup> and such suits may be restrained by injunction,<sup>2</sup> or stayed or set aside on motion.<sup>3</sup> It has been held in the federal courts that the want of leave to sue goes to the jurisdiction of the court in which the suit is brought.<sup>4</sup> But it has been decided in some of the State courts that the want of leave is no jurisdictional bar to a suit at law against receivers appointed by the court of chancery, and that the latter court can only interfere to protect its officers by writs of injunction directed against the party, restraining him from further prosecuting the action, and not against the law court or any of its officers.<sup>5</sup> An act of congress provides that every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice.<sup>6</sup>

Where *mandamus* against a receiver is instituted in the court which appointed him, and the court entertains the action, he cannot object that it is an improper remedy, or that the relief sought might have been obtained in a more summary and less formal manner. *City of Ft. Dodge v. Minneapolis & C. Ry. Co. (Iowa)*, 54 N. W. Rep. 243.

<sup>1</sup> *Beach on Receivers*, § 653; *Wisswell v. Sampson*, 14 How. 65, 66, 67; *Davis v. Gray*, 6 Wall. 208, 218; *Naumburg v. Hyatt*, 24 Fed. Rep. 898; *Thompson v. Scott*, 4 Dill. 508.

<sup>2</sup> *Evelyn v. Lewis*, 8 Hare, 472; *Parr v. Bell*, 9 Ir. Eq. 54; *Tink v. Rundle*, 10 Beav. 818; *Kennedy v. Indianapolis & C. R. Co.*, 8 Fed. Rep. 97. <sup>3</sup> *De Groot v. Jay*, 30 Barb. 488; *Taylor v. Baldwin*, 14 Abb. Pr. 166.

<sup>4</sup> *Barton v. Barbour*, 104 U. S. 126, overruling a demurrer to a plea alleging that no leave was obtained. See, also, *Keen v. Breckenridge*, 96 Ind. 69.

<sup>5</sup> *Lyman v. Central Vermont R. Co.*, 59 Vt. 167; s. c., 10 Atl. Rep. 846, where *Barton v. Barbour*, 104 U. S. 126, is discussed and criticised. See, also, *Kinney v. Crocker*, 18 Wla. 74; *St. Jo. & C. R. Co. v. Smith*, 19 Kan. 235; *Allen v. Central R. Co.*, 42 Iowa. 685; *Hills v. Parker*, 111 Mass. 508.

<sup>6</sup> 25 St. at L., ch. 866, § 3, p. 436; 24 St. at L., ch. 373, § 3, p. 554. For cases involving a construction of this act, see *Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co.*, 41 Fed. Rep. 810, 814; *Central Trust Co. v. St. Louis & C. Ry. Co.*, 41 Fed. Rep. 551; *Atkin v. Wabash Ry. Co.*, 41 Fed. Rep. 193, 194; *Pine Lake Iron Co. v. La Fayette Car Works*, 58 Fed. Rep. 853. Under the act a receiver may be sued for the torts of the servants of his predecessor in the same receivership. *McNulta v. Lockridge*, 142 U. S. 1. The act authorizes an action for personal injuries against the receiver of a railroad. *Fordyce v. Withers (Tex. Civ. App.)*, 20 S. W.

§ 745. **Application for leave to sue receivers.**— It is customary for the court to decide all claims and demands against its receiver by petition in the original action in which he was appointed, instead of authorizing an independent suit.<sup>1</sup> On application for leave to sue a receiver, the court before granting the petition will, by a preliminary examination, determine whether the matter cannot be disposed of by itself, for if it is a clear case of money due on contract, the court will proceed to decide the matter.<sup>2</sup> Where, in an action against a corporation, a receiver is appointed, and all persons holding claims against such corporation are brought into court and notified to appear and wage their claims, an application by a claimant, so appearing, for leave to bring an independent

Rep. 766. Where a receiver knows of the pendency of a suit on a claim which is afterwards filed against him, a failure by the claimant to refer to the suit at the time of filing the claim is not a waiver of the right to prosecute the action, nor does it constitute an election of remedies. *Pine Lake Iron Co. v. La Fayette Car Works*, 58 Fed. Rep. 858.

<sup>1</sup> *People v. Bank of Dansville*, 89 Hun, 187; *Olds v. Tucker*, 85 Ohio St. 581; *Melendy v. Barbour*, 78 Va. 544; *First Nat. Bank v. Wire Works*, 58 Mich. 815; *Kennedy v. Indianapolis & Co.*, 3 Fed. Rep. 97; *Davis v. Michelbacher (Wis.)*, 81 N. W. Rep. 100.

<sup>2</sup> *Lehigh Coal & Co. v. Central R. Co.*, 88 N. J. Eq. 175, 179. Parties who deal with a receiver of a railroad, either as freighters or passengers, cannot sue him for any injury suffered, either in person or property, without leave of the court by which he was appointed. If the adjustment of a claim involves any dispute in regard to the alleged negligence of the receiver, or any other fact upon which his liability depends, or in regard to the amount of the damages sustained by a party, the

court, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law, or direct the trial of a feigned issue to settle the contested facts. *Barton v. Barbour*, 104 U. S. 126. It was held in *Parker v. Kingman*, 126 Mass. 141, that where one purchased an estate subject to a mortgage given by a former owner to a bank, in order to have the mortgage canceled on the ground of fraud, he must proceed by petition in the cause in which the receiver was appointed. Certain tailors received from a firm a large number of coats to be made up, under an agreement that they should have a general lien thereon for the work to be done, and also for money due for prior work. The firm failed, and on suit by other creditors a receiver was appointed. The tailors thereupon petitioned for leave to sue the receiver in foreclosure. It was held that their claim, being of equitable cognizance, could be determined in the receivership suit, and it was within the discretion of the court to deny the petition. *In re Herbst*, 17 N. Y. Supl. 760.

action against the receiver to foreclose certain mortgages on the corporate property, will be denied, since the rights of such claimant can be properly adjudicated in the original action.<sup>1</sup> As a general rule, leave to sue a receiver in any court other than the one which appointed him will not be granted; it is only when special facts and circumstances are shown to exist that the court will allow such a suit to be brought.<sup>2</sup> An order granting leave to sue is sufficient when made upon notice to the receiver alone.<sup>3</sup>

**§ 746. Leave of court to make a receiver a party.**— After a State court has appointed a receiver of all the property of a corporation, and while the receivership exists, stockholders of the corporation cannot bring a suit against the officers in a court of the United States for fraudulent misappropriation of its property without making the receiver as well as the corporation a party to the suit, and although the State court has denied a petition of the receiver for authority to bring the suit as well as an application of the stockholders for leave to make him a party to it.<sup>4</sup> Consequently, so long as the court

<sup>1</sup> *Meeker v. Sprague* (Wash.), 81 Pac. Rep. 628. In a suit against a mortgagor, a receiver was appointed without notice to a mortgagee in possession of a stock of goods. The mortgagee obtained leave to sue the receiver in replevin, and complied with all the conditions of the order, but the court afterwards revoked such permission and dismissed the action of replevin, refusing to hear evidence that the mortgagee held a valid first mortgage on the goods. This was held to be an abuse of discretion. *Conwell v. Lawrence*, 46 Kan. 83; s. c., 26 Pac. Rep. 461.

<sup>2</sup> *Matter of Platt*, 52 How. Pr. 468; *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414.

<sup>3</sup> *Potter v. Bunnell*, 20 Ohio St. 150, 159.

<sup>4</sup> *Porter v. Sabin*, 149 U. S. 478, where Justice Gray said:—"The right to maintain a suit against the officers

of a corporation for fraudulent misappropriation of its property is a right of the corporation; it is only when the corporation will not bring the suit that it can be brought by one or more stockholders in behalf of all. *Hawes v. Oakland*, 104 U. S. 450. The suit when brought by stockholders is still a suit to enforce the rights of the corporation and to recover a sum of money due to the corporation, and the corporation is a necessary party in order that it may be bound by the judgment. *Davenport v. Dams*, 18 Wall. 626. If the corporation becomes insolvent and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce this and all other rights of property of the corporation vests in the receiver and he is the proper party to bring suit, and if he does not himself sue, should properly be made a defend-

appointing the receiver prefers to exercise exclusive jurisdiction over such claims against the delinquent officers of the

ant to any suit by stockholders in the right of the corporation. . . . In *Brinckerhoff v. Bostwick*, 88 N. Y. 52, and *Ackerman v. Halsey*, 87 N. J. Eq. 356, cited for the plaintiffs, in which stockholders of a national bank were permitted to bring such a suit when a receiver had refused to bring it, the receiver was not appointed by a judicial tribunal, but by the comptroller of the currency, an executive officer. . . . When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court, and the court itself holds and administers the estate through the receiver as its officer for the benefit of those whom the court shall ultimately adjudge to be entitled thereto. *Wiswall v. Sampson*, 14 How. 52, 65; *Peale v. Phipps*, 14 How. 368, 374; *Booth v. Clark*, 17 How. 823, 831; *Union Bank v. Kansas City Bank*, 136 U. S. 228; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 297. It is for the court in its discretion to decide whether it will determine for itself all claims of or against the receiver or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of it; and no suit, unless expressly authorized by statute, can

be brought against the receiver without the permission of the court which appointed him. *Barton v. Barbour*, 104 U. S. 126; *Texas &c. Ry. Co. v. Cox*, 145 U. S. 598, 601. The reasons are yet stronger for not allowing a suit against a receiver appointed by a State court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with by a court of the United States deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action except what is already disposed of under orders of that court, remains in its custody to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action constituting part of the estate within the exclusive jurisdiction and control of the courts of the other. *Wiswall v. Thompson*, *supra*; *Peale v. Phipps*, *supra*; *Barton v. Barbour*, *supra*; *Williams v. Benedict*, 8 How. 107; *Pulliam v. Osborne*, 17 How. 471, 475; *People's Bank v. Calhoun*, 102 U. S. 256; *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294; *In re Tyler*, 149 U. S. 164. The State court, upon further hearing or information, may hereafter reconsider its final orders so far as no rights have lawfully vested under them, and may permit its receiver to sue or be sued upon any controverted claim. But should it prefer not to do so, the right of action of the corporation

corporation, no action against them can be maintained in any other tribunal.<sup>1</sup>

**§ 747. Suits by receivers in foreign jurisdictions — Comity.**— A receiver has no extraterritorial jurisdiction, and cannot, as a matter of strict right, go into another State and there sue on a debt due to the person or estate subject to his receivership.<sup>2</sup> But it is a well-established exception to this

against its delinquent officers, like other property and rights of the corporation, will remain within the exclusive jurisdiction of that court so long as the receivership exists."

<sup>1</sup>Porter v. Sabin, 149 U. S. 478.

<sup>2</sup>Booth v. Clark, 17 How. 822, a leading case, where Justice Swayne said that a receiver "has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court, or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek. . . . We think that a receiver could not be admitted to the comity extended to judgment creditors without an entire departure from chancery proceedings as to the manner of his appointment; the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give secu-

rity to the court the aid of which he seeks, for his faithful conduct and official accountability." *Brigham v. Luddington*, 12 Blatchf. 237; *Hazard v. Durant*, 19 Fed. Rep. 471; *Olney v. Tanner*, 10 Fed. Rep. 101; *s. c.* on appeal, 21 Blatchf. 540; *Holmes v. Sherwood*, 16 Fed. Rep. 725; *Hope Mutual Ins. Co. v. Taylor*, 2 Robert. (N. Y.) 278; *Warren v. Union Nat. Bank*, 7 Phila. 156; *Farmers' & Merchants' Ins. Co. v. Needles*, 52 Mo. 17; *Graydon v. Church*, 7 Mich. 36; *Bartlett v. Wilbur*, 53 Md. 485; *Winans v. Gibbs & S. Mfg. Co.*, 48 Kan. 777; *s. c.*, 30 Pac. Rep. 163; *Filkins v. Nunnemacher*, 81 Wis. 91; *s. c.*, 51 N. W. Rep. 79. *Contra*, *Metzner v. Bauer*, 98 Ind. 425; *Runk v. St. John*, 29 Barb. 585. A receiver appointed by one federal court has no right to sue in another federal court. *Brigham v. Luddington*, 12 Blatchf. 237. See, also, *Holmes v. Sherwood*, 16 Fed. Rep. 725; *s. c.*, 3 McCrary, 405. Since a receiver has no extraterritorial jurisdiction, and cannot, as a matter of strict right, go into another State and there sue on a debt due to the person or estate subject to his receivership, though he may be allowed to do so as a matter of comity when no detriment will result to the citizens of the State where the action is brought, the appointment of a receiver in another State of a corporation in that State will not prevent the corporation from suing in its own name in a foreign

rule, that where there are no domestic creditors whose rights are to be protected, or no local interests adverse to the suit, the courts of a State will recognize a non-resident receiver and permit him to prosecute an action therein, or move to set aside a judgment fraudulent as to the creditors represented by him.<sup>1</sup> The decisions sustaining this exception are

*Stata. Winans v. Gibbs & Sterrett Mfg. Co.*, 48 Kan. 777; a. c., 80 Pac. Rep. 163, holding that the Kansas statute relating to suits by receivers did not apply in such case.

<sup>1</sup>*Comstock v. Frederickson* (Minn.), 58 N. W. Rep. 718, where it was said that in *Putnam v. Pitney*, 45 Minn. 246, "the narrow view as applied to foreign executors and administrators is followed and applied on the ground of *stare decisis*." *Beach on Receivers*, § 683; *Dyer v. Power*, 14 N. Y. Supl. 873, following *Peters v. Foster*, 10 N. Y. Supl. 389; *Bank v. McLeod*, 38 Ohio St. 174. See, also, *Chicago & C. R. Co. v. Keokuk Northern Line Packet Co.*, 108 Ill. 817; *Bagley v. Atlantic & C. R. Co.*, 86 Pa. St. 291; *Killmer v. Hobart*, 58 How. Pr. 452; *Bidlack v. Mason*, 26 N. J. Eq. 230. In *Hurd v. Elizabeth*, 41 N. J. Law, 1 (followed in *Falk v. James* (N. J. Eq.), 28 Atl. Rep. 818), *Beasley, C. J.*, said:—"The plaintiff's right to stand as the actor in this suit is derived wholly from the receivership that was conferred upon him by the Supreme Court of the State of New York; and on the part of the defendant such right is contested on the ground that it is contrary to established rules for the courts here to lend their assistance in carrying into effect an office created in the course of a proceeding before a foreign tribunal. To countenance this contention various authorities are cited, and notably among them *Booth v. Clark*, 17 How. 322. But that case belongs to a train of decisions which have been undoubt-

edly rightly decided. . . . They are all cases involving a controversy between the receiver and the creditors of the person whose property has been placed under the control of such receiver. In such a posture of things it is manifest that different considerations should have force from those that are to control when the litigation does not involve the rights of creditors in opposition to the claims of the receiver. That the officer of a foreign court should not be permitted, as against the claims of creditors here, to remove from this State the assets of the debtor is a proposition that seems to be assented to by all the decisions; but that, similarly, he should not be permitted to remove such assets when creditors are not so interested is quite a different affair. . . . There are certainly *dicta* that go even to that extent, so that text-writers seem to have felt themselves warranted in declaring that the powers of an officer of this kind are strictly circumscribed by the jurisdictional limits of the tribunal from which he derives his existence; and that he will not be recognized as a suitor outside of such limits. But I think the more correct definition of the legal rule would be that a receiver cannot sue or otherwise exercise his functions in a foreign jurisdiction whenever such acts, if sanctioned, would interfere with the policy established by law in such foreign jurisdiction. There seems to be no reason why this should not be the accepted principle. When there



based solely upon the ground that in the particular case before the court the receiver ought to be permitted to prosecute such suit as a matter of comity only; and most of them declare that where the rights of their own citizens would be injuriously affected by extending such comity to foreign receivers the favor will not be granted.<sup>1</sup> To avoid the difficulties which beset a receiver in suing for property in another State, the practice has arisen of forcing the party whose property is to be taken possession of by a receiver to convey it by formal deed or assignment to the receiver; which may enable him to bring suits in some States where his right to bring the suit might not otherwise be recognized.<sup>2</sup> Purely statutory receivers stand upon a different footing from ordinary re-

are no persons interested but the litigants in a foreign jurisdiction, and it becomes expedient, in the progress of such suit, that the property of one of them, wherever it may be situated, should be brought in and subjected to such proceedings, I can think of no objection against allowing such a power to be exercised. It could not be exercised in a foreign jurisdiction to the disadvantage of creditors resident there, because it is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied. . . . After completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided. The appointment of a receiver, with full powers to collect the property of a litigant wherever the same might be found, should be deemed to operate as an assignment of such property, to be enforced everywhere subject to the exception just noted."

<sup>1</sup>Bartlett v. Wilbur, 58 Md. 485; Hunt v. Columbian Ins. Co., 55 Me. 290; Humphreys v. Hopkins, 81 Cal. 551; Dyer v. Power, 14 N. Y. Supl.

873; Straughan v. Hallwood, 80 West Va. 274, 288, 289; Hurd v. Elizabeth, 41 N. J. Law, 1. In Humphreys v. Hopkins, 81 Cal. 551, it was held that a resident creditor may attach property which has been in the actual possession of a foreign receiver and afterward brought into California. And in Chicago & C. R. Co. v. Keokuk Northern Line Packet Co., 108 Ill. 817, it was held that "where a receiver has once obtained rightful possession of personal property within the jurisdiction of his appointment, and in the performance of his duty takes it into a foreign jurisdiction, it cannot be taken while there by creditors who reside in that jurisdiction." See, also, Cooke v. Orange, 48 Conn. 401. In Filkins v. Nunnemacher, 81 Wis. 91; s. c., 51 N. W. Rep. 79, it was held that judicial comity does not allow a receiver appointed in a creditor's suit in an Illinois court to maintain a suit in Wisconsin to set aside an alleged fraudulent conveyance from the debtor to the defendant.

<sup>2</sup>See Graydon v. Church, 7 Mich. 86; Straughan v. Hallwood, 80 West Va. 274, 288, 289; Iglehart v. Bierce, 86 Ill. 183; Hoyt v. Thompson, 5 N. Y. 820.

ceivers, and will be recognized in foreign courts as assignees vested with a legal title.<sup>1</sup>

§ 748. *Receivers' accounts.*—It is the duty of the receiver to make a full and complete inventory of the property in his hands, and to keep a fair and accurate account of all of his receipts and disbursements in the administration of his trust.<sup>2</sup> He ought to render accounts to the court at regular intervals without being called upon to do so.<sup>3</sup> The court from which he derives his appointment may require him to account at any time,<sup>4</sup> even though the appointment be void, provided he actually undertakes to perform the duties of a receiver.<sup>5</sup> The usual practice is to require an account at least once a year.<sup>6</sup> Any party to the proceeding may move for an accounting,<sup>7</sup> but the account is rendered to the court, and he cannot be compelled to render statements of accounts to a party to the suit.<sup>8</sup> A receiver's accounts are usually filed and passed in the office of the master.<sup>9</sup> Before the master the receiver

<sup>1</sup> 20 Amer. & Eng. Encyc. of Law, 246; *Relfe v. Rundle*, 108 U. S. 223; *Bockover v. Life Ass'n*, 77 Va. 85; *Parson v. Charter Oak L. Ins. Co.*, 81 Fed. Rep. 306. See, also, *Fry v. Charter Oak L. Ins. Co.*, 81 Fed. Rep. 197; *Weingartner v. Charter Oak L. Ins. Co.*, 83 Fed. Rep. 814.

<sup>2</sup> *Hooper v. Winston*, 24 Ill. 353, 365; *Akers v. Veal*, 66 Ga. 302; *Mat-ter of Seaman*, 2 Paige, 409.

<sup>3</sup> *McBride v. Clarke*, 1 Mol. 288; *Adams v. Woods*, 8 Cal. 306.

<sup>4</sup> *De Winton v. Mayor of Brecon*, 28 Beav. 200; *Mabry v. Harrison*, 44 Tex. 286. A receiver in a suit in a State court, which was subsequently removed into the federal court, may be required to account in the latter court. *Hinckley v. Gilman & Co. R. Co.*, 100 U. S. 153.

<sup>5</sup> *O'Mahoney v. Belmont*, 62 N. Y. 133. Where the appointment is irregular his accounts will be closely scrutinized. *Corey v. Long*, 12 Abl. Pr. (N. Y.) 427.

<sup>6</sup> *Day v. Croft*, 6 Eng. L. & Eq. 62;

*Lowe v. Lowe*, 1 Tenn. Ch. 515. In New York the accounting of receivers of corporations is fixed at six months by statute. N. Y. Laws of 1883, ch. 878, § 4; *People v. Knickerbocker L. Ins. Co.*, 81 Hun, 622.

<sup>7</sup> *Lowe v. Lowe*, 1 Tenn. Ch. 515; *Stretch v. Gowdey*, 8 Tenn. Ch. 565. A third party has no standing to maintain such an application. *Colburn v. Cooper*, 8 Ir. Eq. 510.

<sup>8</sup> *Musgrove v. Nash*, 3 Edw. Ch. 172.

<sup>9</sup> *Beach on Receivers*, § 747; *Daniel's Ch. Pr.* (2d Am. ed.) 1996, 1997. "A receiver is but the steward of the court, and should give to the court all the information necessary to enable it to judge intelligently as to the manner in which it is being served by its agent. In presenting his account for allowance the receiver occupies a position analogous to that of a plaintiff; he is charged with all that he admits or is shown to have received, and it is for him to show that he has paid out the sums for which he asks credit. The receiver

holds the affirmative; it is for him to show satisfactorily that he is entitled to the credits he claims.<sup>1</sup> Receipts and drafts signed by a trustee for funds in a receiver's hands are *prima facie* correct, and, in the absence of evidence to the contrary, should be deemed valid, and allowed to the receiver on settlement of his accounts.<sup>2</sup> In England the master's report on a reference of a receiver's accounts does not require confirmation, and, strictly speaking, exceptions cannot be taken to it, the remedy of a party aggrieved being by petition to review the questions of law arising thereunder.<sup>3</sup> A similar rule obtains in the federal courts, where the court will not consider exceptions that were not taken before the master.<sup>4</sup> In New

York is held to great strictness in respect to his accounts, and when he fails to produce vouchers for disbursements, a satisfactory reason for such failure should be given. The vouchers should be filed with the account, and for such items as there are no vouchers the receiver should file a verified statement showing to whom and for what and when such items were paid, and this verification should be positive, not merely upon belief. In such instances as the receiver, from not having himself personally made or witnessed the payment, is unable to swear positively to the disbursement, it would seem the positive affirmation under oath of the person who did make the payment should be filed, and this should be supplemented by the sworn statement of the receiver as to his information and belief in the matter. Where . . . proper and regular books of account are kept showing all receipts and disbursements, such books, supplemented by the oath of the book-keeper that the same contain a complete, just and true account of all receipts and disbursements, and are a regular and full set of books kept in and about the business, are admissible as evidence of the payments therein shown. All this should be

done before an allowance of the account is asked, in order that not only the court but all parties in interest, notice having been given, may have an opportunity to intelligently examine the accounts and determine what portion, if any, they desire to object to; and if objections are filed to the account or any items thereof, the English rule is to refer such details to a master; and in analogy to the decisions in this State requiring long and complicated accounts between parties to be referred to a master to take testimony and report his conclusions as to the same, the better practice would seem to be to refer the disputed items to a master to take testimony and report his conclusions as to the same. Beach on Receivers, § 747." *Heffron v. Gore*, 40 Ill. App. 244, 255. It was held in *Greeley v. Provident Sav. Bank (Mo.)*, 15 S. W. Rep. 429, that there was no error in not requiring at the hands of the receiver and his counsel an itemized account of their services.

<sup>1</sup> *Heffron v. Gore*, 40 Ill. App. 244, 255.

<sup>2</sup> *Burroughs v. Bunnell*, 70 Md. 18.

<sup>3</sup> *Shewell v. Jones*, 2 Sim. & Stu. 170; s. c., *aff'd*, 8 Russ. 523; *Cowper v. Earl Cowper*, 2 P. Wms. 720.

<sup>4</sup> *Cowdrey v. Railroad Co.*, 1 Woods,

Jersey the master's report requires confirmation, and exceptions may be taken thereto, and the several items of the account may be examined.<sup>1</sup> Where a receiver's account has been filed and passed by the master it cannot be assailed in any other way than by a direct proceeding alleging error, fraud, mistake, or the like.<sup>2</sup> The receiver may appeal from a final decree ascertaining the balance for which he is liable,<sup>3</sup> and from such a decree any party to the suit may appeal.<sup>4</sup> Upon an appeal it is deemed a safe rule to presume that the action of the chancellor in passing upon the accounts was correct.<sup>5</sup> A receiver should not be charged with the expenses of an accounting when no misconduct on his part is shown, and his accounts are substantially sustained.<sup>6</sup>

**§ 749. Removal of receivers.**—The court which creates a receiver may at any stage of the litigation put an end to his functions by removing him.<sup>7</sup> Where it appears that the appointment of the receiver was improvidently made, the court may unquestionably vacate the appointment and thus remove

381, holding, however, that the court may direct an account to be reformed which contains manifest errors or plainly improper charges. See, also, *Brower v. Brower*, 2 Edw. Ch. 631.

<sup>1</sup>*Richards v. Morris Canal &c. Co.*, 4 N. J. Eq. 428. See, also, *Mechanics' Bank v. Bank of New Brunswick*, 3 N. J. Eq. 487; *Woolsey v. Cummings Car Works*, 38 N. J. Eq. 432.

<sup>2</sup>*Farmers' L. & T. Co. v. Central R. Co.*, 2 Fed. Rep. 751; s. c., 1 McCrary, 352.

<sup>3</sup>*Hinckley v. Gilman &c. R. Co.*, 94 U. S. 467; *Hovey v. McDonald*, 109 U. S. 150; *Adair County v. Ownby*, 75 Mo. 282. See, also, *Howe v. Jones*, 60 Iowa, 70.

<sup>4</sup>*Hovey v. McDonald*, 109 U. S. 150; *Adams v. Woods*, 15 Cal. 206.

<sup>5</sup>*Terry v. Martin (New Mex.)*, 82 Pac. Rep. 139, 157.

<sup>6</sup>*Hynes v. McDermott*, 14 Daly (N. Y.), 104.

<sup>7</sup>*Shackelford's Adm'r v. Shackelford*, 32 Gratt. 431; *Ferry v. Bank*, 15 How. Pr. 445, 458; *In re Colvin*, 8 Md. Ch. 300; *Crawford v. Ross*, 39 Ga. 44; *Siney v. New York Consolidated Stage Co.*, 28 How. Pr. 431; *McCullough v. Merchants' Loan & Trust Co.*, 29 N. J. Eq. 217; *Young v. Montgomery &c. R. Co.*, 2 Woods, 606. For this purpose it is held that a court of equity is always open. *Crawford v. Ross*, 39 Ga. 44. It is generally held that the receiver being an officer of the court has no right to ask for a review by appeal from the order removing him unless he be a party to the action in which he was appointed. *Beach on Receivers*, § 781; *Conner v. Belden*, 8 Daly (N. Y.), 257. See, also, *Farson v. Gorham (Ill.)*, 4 West. Rep. 111; *Connolly v. Kretz*, 78 N. Y. 620.

the receiver.<sup>1</sup> The court will consider specific complaints of maladministration against a receiver notwithstanding the irregularity of the method by which they are brought to its notice, *e. g.*, by way of petition under an order for leave to answer, etc., in the name of the receiver in a foreclosure suit.<sup>2</sup> The proceedings for removal must ordinarily be commenced by motion in the suit and before the court in which the receiver was originally appointed.<sup>3</sup> But where a receiver is appointed by a State court in a case which is subsequently removed to a federal court, the latter may entertain and pass upon a motion for the removal of the receiver at any time after the filing of the record.<sup>4</sup> The motion for removal should specify the grounds of the application and due notice thereof should be given to the receiver<sup>5</sup> and to all the par-

<sup>1</sup> *Copper Hill Mining Co. v. Spencer*, 25 Cal. 11, 16; *Walters v. Anglo-American M. & T. Co.*, 50 Fed. Rep. 816, at chambers. See, also, *Merchants' & Mechanics' Bank v. Griffith*, 10 Paige, 512.

<sup>2</sup> *Coe v. N. J. Midland Ry. Co.*, 28 N. J. Eq. 81.

<sup>3</sup> *Davis v. Michelbacher*, 81 N. W. Rep. 160; *Young v. Montgomery*, 2 Woods, 606. Delay in making the application may be sufficient ground for denying it. *Brown v. Lake Superior Iron Co.*, 184 U. S. 580. Upon original application of the insolvent Wabash Railroad Company in the United States circuit court for the eastern district of Missouri, certain receivers were appointed and their appointment confirmed by these several circuit courts exercising ancillary administration. Afterwards one of these latter courts, acting within its circuit, removed these receivers for unfitness and appointed another to act within the jurisdiction of the appointing court. It was held by the court originally appointing the removed receivers that although this action was not according to the comity between the various circuit

courts, yet an order would issue directing the receivers removed in such circuit to surrender the control of the lines within the jurisdiction of the court making the removal order to the receiver appointed in their stead. *Central Trust Co. v. Wabash & Co. Ry. Co.*, 29 Fed. Rep. 618.

<sup>4</sup> *Texas & Co. Ry. Co. v. Rust*, 17 Fed. Rep. 275, 280; *Mahoney Mining Co. v. Bennett*, 4 Sawyer, 289; *Dillon's Removal of Causes* (4th ed.), § 80; *Foster's Federal Judiciary Acts*, 19, 39; *Beach on Receivers*, § 778. *Cf. Atkins v. Wabash & Co. Ry. Co.*, 29 Fed. Rep. 161. "But if the defendants had made the motion and submitted it to the determination of the State court before the removal, and that court had denied the motion and they had then removed the cause, this court would not have entertained a motion on the same record until the trial term." *Texas & Co. Ry. Co. v. Rust*, 17 Fed. Rep. 275.

<sup>5</sup> *Dougherty v. Jones*, 87 Ga. 348; *Campbell v. Spratt*, 5 N. Y. Weekly Dig. 25; *Smith v. Trenton D. Falls Co.*, 4 N. J. Eq. 505. *Cf. Herman v. Dunbar*, 28 Beav. 812; *Howard v. Lowell Machine Co.*, 75 Ga. 825:

ties.<sup>1</sup> Ordinarily a receiver will not be removed upon his own application except for good cause shown.<sup>2</sup> A receiver will be removed where it is shown that his appointment was collusive or fraudulent,<sup>3</sup> and although there be nothing against his character or ability, if he have a private interest in conflict with the management,<sup>4</sup> and where he fails to comply with an order for additional security,<sup>5</sup> or becomes bankrupt or insolvent.<sup>6</sup> Where two joint receivers act in hostility to each other both may be removed.<sup>7</sup> Where an officer of a corporation has been appointed its receiver, and it appears proper that his conduct as such officer should be investigated to ascertain whether he has not obtained an advantage which he ought not to be permitted to retain, sufficient cause for removal exists.<sup>8</sup> A receiver of a railroad who is guilty of wanton and unjust discrimination in rates will be removed.<sup>9</sup> Relationship of the

*Bruns v. Stewart Mfg. Co.*, 81 Hun, 195. But in *L'Engle v. Florida Cent. Ry. Co.*, 14 Fla. 266, it was held that the receiver is not entitled to be heard in opposition, because he is merely an officer of the court and not a party in interest. See, also, *Herman v. Dunbar*, 28 Beav. 312.

<sup>1</sup> *Attorney-General v. Haberdashers' Society*, 2 Jur. 915; *Campbell v. Spratt*, 5 N. Y. Weekly Dig. 25; *Bruns v. Stewart Mfg. Co.*, 81 Hun, 195; *Attrill v. Rockaway Beach Imp. Co.*, 25 Hun, 509.

<sup>2</sup> *Richardson v. Ward*, 6 Madd. Ch. 266; *Beers v. Chelsea Bank*, 4 Edw. Ch. 277; *In re Lyle*, 2 Paige, 251; *Smith v. Vaughan*, Cas. temp. Hardw. 251; *Beach on Receivers*, § 782. An application based upon the interference of the duties of the receiver with his own private business was denied. *Beers v. Chelsea Bank*, 4 Edw. Ch. 277. Cf. *Edwards on Receivers*, § 661. But a receiver was discharged upon his own petition for incapacity by reason of blindness. *Richardson v. Ward*, 6 Madd. Ch. 266.

<sup>3</sup> *Wood v. Oregon Development Co.*, 55 Fed. Rep. 901; *O'Mahoney v. Bel-*

*mont*, 62 N. Y. 183, 144, affirming s. c., 37 N. Y. Super. Ct. 228; *Wilson v. Barney*, 5 Hun, 257, where Daniels, J., said:—"A collusive or fraudulent proceeding, even though judicial in its nature, cannot be maintained, but it may be assailed and disregarded whenever and wherever it may be brought into question."

<sup>4</sup> *Fripp v. Chard R. Co.*, 22 L. J. Ch. 1084; *Atkins v. Wabash & C. Ry. Co.*, 29 Fed. Rep. 161. But see *Bank of Monroe v. Schermerhorn*, Clarke's Ch. 366.

<sup>5</sup> *Shackelford v. Shackelford*, 32 Gratt. 481.

<sup>6</sup> 2 Daniell's Ch. Pr. (5th ed.) 1765; *Kerr on Receivers*, 267; *Crawford v. Ross*, 39 Ga. 48; *Ellard v. Cooper*, 17 Ir. Ch. (N. S.) 15.

<sup>7</sup> *Meier v. Kansas Pac. R. Co.*, 5 Dill. 476.

<sup>8</sup> *McCullough v. Merchants' Loan & Trust Co.*, 29 N. J. Eq. 217.

<sup>9</sup> *Haddy v. Cleveland & M. R. Co.*, 31 Fed. Rep. 639. In that case the Standard Oil Company having threatened to store its oil until it could lay a line of pipes to Marietta unless the receiver of a railroad company should

receiver to one of the parties is not deemed sufficient ground of removal unless a bias on his part is shown;<sup>1</sup> nor employment by the receiver of the counsel of one of the parties as his counsel;<sup>2</sup> nor his employment of the defendant, a judgment debtor, as his assistant in making collections.<sup>3</sup> So consent of the defendants to the appointment of a receiver will estop them from objecting to the person of the receiver unless he commits some overt act of unfaithfulness to his trust which can be specified and pointed out.<sup>4</sup>

**§ 750. Discharge of a receiver.**—The power of the court to discharge a receiver is a necessary adjunct of the power of appointment and may be exercised at any stage of the litigation.<sup>5</sup> The functions of a receiver usually terminate with the

give it a special oil rate, the receiver agreed to carry its oil at ten cents per barrel, to charge rival shippers thirty-five cents per barrel, and to pay twenty-five cents per barrel of the sum collected from rival shippers to the Standard Oil Company. It was held to be such gross and wanton discrimination on the part of the receiver as to require his removal. Courts of equity will protect the interests of the minority holders of mortgages of a railroad company as against the majority, and will remove receivers appointed at the instigation of the majority where it appears that the receivers are incompetent, and that part of them have interests in other corporations adverse to the interests of the minority mortgagees, and are using their influence and powers as receivers in advancing such corporations at the expense of the railroad. *Atkins v. Wabash & Ry. Co.*, 29 Fed. Rep. 161.

<sup>1</sup> *Wetter v. Schliepper*, 7 Abb. Pr. 92. In *Williamson v. Wilson*, 1 Bland (Md.), 418, and *Shainwald v. Lewis*, 8 Fed. Rep. 878, 879, receivers were removed on a presumption of bias arising out of all the circumstances.

<sup>2</sup> *Bank of Monroe v. Schermerhorn*, Clarke's Ch. 366; *Smith v. New York Consolidated Stage Co.*, 18 Abb. Pr. 418; *Hynes v. McDermott*, 8 N. Y. St. Rep. 582.

<sup>3</sup> *Ross v. Bridge*, 24 How. Pr. 163.

<sup>4</sup> *Cowdrey v. Railroad Co.*, 1 Woods, 350.

<sup>5</sup> *Ferry v. Bank &c.*, 15 How. Pr. 446; *In re Colvin*, 8 Md. Ch. 300. A federal court may discharge a receiver appointed in the suit by a State court before its removal to the federal court. *Texas &c. Ry. Co. v. Rust*, 17 Fed. Rep. 275; *Mahoney Mining Co. v. Bennett*, 4 Sawy. 287. A motion to discharge a receiver, made on the same grounds on which it had been previously dismissed in the State court, will not be granted by the federal court after removal of the cause. *Bryant v. Thompson*, 27 Fed. Rep. 881. The receiver cannot appeal from the exercise of the right to discharge him and require him to restore the property. *In re Colvin*, 8 Md. Ch. 300; *Ellicott v. Warford*, 4 Md. 80. Nor can a party to the cause appeal from an order of discharge. *In re Colvin*, *supra*.

termination of the litigation in which he was appointed.<sup>1</sup> But the discontinuance or abatement of a suit does not *ipso facto* discharge a receiver appointed therein.<sup>2</sup> The party procuring the appointment of the receiver cannot have the receiver discharged without the latter being first required to pass his accounts.<sup>3</sup> Nor is the receiver entitled as of course to a discharge upon his own application; he must show some reasonable ground for the application.<sup>4</sup> Where a defendant debtor satisfies the claim of the plaintiff he is entitled as of right to an order of discharge of the receiver, and a refusal to grant it is error which may be reversed on appeal.<sup>5</sup> The court will discharge a receiver of its own motion when it appears that his appointment was fraudulent and collusive.<sup>6</sup> When the plaintiff neglects to proceed with the cause, after obtaining the appointment of the receiver, he will be discharged.<sup>7</sup> So a receiver may be discharged on account of irregularity in the

<sup>1</sup> Field v. Jones, 11 Ga. 418; Ireland v. Nichols, 40 How. Pr. 85; Beverly v. Brooke, 4 Gratt. 220.

<sup>2</sup> McCosker v. Brady, 1 Barb. Ch. 346; Whiteside v. Prendergast, 2 Barb. Ch. 471; Ireland v. Nichols, 40 How. Pr. 85; State v. Gibson, 21 Ark. 140. But it will entitle him to apply for his discharge and to pass his accounts so that he may pay over the balance, if any, in his hands and exonerate him and his sureties from further liability unless the interests of the defendants require that he should continue in the receivership to protect their rights, and if he be thus continued the defendant will be required to file a bill forthwith to settle his rights. Whiteside v. Prendergast, 2 Barb. Ch. 471; Murrough v. French, 2 Moll. 497; Lorgan v. Bowen, 1 S. & L. 296.

<sup>3</sup> White v. Lord Westmeath, 2 Hoggan, 38. See, also, Bainbrigge v. Blair, 3 Beav. 421; People v. Globe Mut. L. Ins. Co., 57 How. Pr. 481; Fay v. Erie & C. Bank, Harring. (Mich.) 194.

<sup>4</sup> Beers v. Chelsea Bank, 4 Edw. Ch.

277; Smith v. Vaughan, Cas. temp. Hardw. 251.

<sup>5</sup> Milwaukee & C. R. Co. v. Soutter, 2 Wall. 510; Davis v. Duke of Marlborough, 2 Swans. 168. But see Fay v. Erie & C. Bank, Harring. (Mich.) 194; Bainbrigge v. Blair, 3 Beav. 421.

<sup>6</sup> Sage v. Memphis & C. R. Co., 18 Fed. Rep. 571. Cf. Bowers Bank Case, 5 Abb. Pr. 415. But the concurrence of directors in an attempt to secure the appointment of a receiver does not amount to fraud unless injury is intended to the company or its creditors. Brassby v. New York & C. R. Co., 19 Fed. Rep. 663.

<sup>7</sup> National Mechanics' Banking Ass'n v. Mariposa Co., 60 Barb. 423, which was a motion to set aside an order appointing a receiver. It appeared that the plaintiff, after moving for a receiver of his debtor's property, consented that the proceedings might lie dormant and took no further steps for over a year, until another creditor had procured the appointment of a receiver. The court refused to allow the one thus appointed upon the subsequent appli-



appointment;<sup>1</sup> or where it is for the interests of the parties concerned;<sup>2</sup> or where the object of the receivership is attained.<sup>3</sup> A receiver of the estate of an infant will not be discharged until a year after the infant's majority, unless the ward, after majority, consents to his discharge.<sup>4</sup> The entry of a final decree which does not provide for the continuance of a receivership supersedes the appointment of a receiver.<sup>5</sup> The plaintiff, the defendant, the receiver himself, or any one injured by the appointment of a receiver, although not a party to the suit, may apply for the discharge of the receiver.<sup>6</sup> Notice of the proceeding must be given to all the parties interested.<sup>7</sup>

**§ 751. Effect of a discharge.**—The final discharge of a receiver terminates his official character, and no suit can be prosecuted against him in an official or representative capacity<sup>8</sup> for torts committed by his employees while he was receiver,<sup>9</sup> and

cation to be displaced but discharged the other. See, further, to the point that an application for a discharge may be denied on the ground of laches of the moving party, *Allen v. Dallas & Co. R. Co.*, 8 Woods, 316, 331; *Hazard v. Credit Mobilier*, 38 Fed. Rep. 195; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530.

<sup>1</sup> *Lavender v. Lavender, Jr.* 9 Eq. 498; *Furlong v. Edwards*, 3 Md. 99; *Beach on Receivers*, § 794.

<sup>2</sup> *Beach on Receivers*, § 796; *Ferry v. Bank & Co.*, 15 How. Pr. 445; *Popper v. Schneider*, 7 Abb. Pr. (N. S.) 56; *Davy v. Greenow*, 14 L. J. (N. S.) Ch. 134.

<sup>3</sup> *In re Colvin*, 3 Md. Ch. 207; *In re Long Branch & Sea Shore R. Co.*, 24 N. J. Eq. 398; *Beach on Receivers*, § 798.

<sup>4</sup> *Matter of Van Horne*, 7 Paige, 346; *Wildridge v. McKane*, 2 Molloy, 545. See, also, *Smith v. Lyster*, 4 Beav. 227.

<sup>5</sup> *Daniell's Ch. Pr.* (5th ed.) 1765.

<sup>6</sup> *Grenfell v. Dean of Windsor*, 2

*Beav.* 544; *Thomas v. Brigstocke*, 4 Russ. 64; *Milwaukee & Co. R. Co. v. Soutter*, 2 Wall. 510; *Langdon v. Vermont & Co. R. Co.*, 53 Vt. 238.

<sup>7</sup> *Davis v. Duke of Marlborough*, 2 Swanst. 118; *Bainbrigg v. Blair*, 3 Beav. 421, 423.

<sup>8</sup> *Davis v. Duncan*, 19 Fed. Rep. 477, holding that a decree of discharge cannot be set aside by motion at the next term; *White v. Keokuk & Co. Ry. Co.*, 53 Iowa, 97. Damages to the estate resulting from the receiver's mismanagement cannot be recovered after his discharge from the sureties upon an injunction bond concurrent with his appointment. *Lehman v. McQuown*, 31 Fed. Rep. 138.

<sup>9</sup> *McNulta v. Lockridge*, 137 Ill. 279; s. c., 27 N. E. Rep. 452, 454; *Telegraph Co. v. Jewett*, 115 N. Y. 166; *Farmers' L. & T. Co. v. Central R. Co.*, 2 McCrary, 181; s. c., 7 Fed. Rep. 537; *McNulta v. Lockridge*, 141 U. S. 327, 332.

no judgment can be rendered against a receiver officially after his discharge whereby to charge the property of which he was the custodian.<sup>1</sup> A judgment against an ancillary receiver after his discharge is not binding, though the court did not know of his discharge.<sup>2</sup> The effect of a decree of a federal court discharging a receiver, as a bar to any suit against the latter for liability incurred by virtue of his office, cannot be limited or controlled by a State statute declaring that the discharge of a receiver shall not abate any pending suit on a cause of action accruing against him as receiver.<sup>3</sup> This is simply an application of the well-established rule that neither the substantive powers of the federal courts in equity, nor the rules of practice and procedure through which they are exercised, are subject to limitation or modification by State legislation.<sup>4</sup> But an order of the federal court requiring the receiver

<sup>1</sup> *Bond v. State* (Miss.), 9 So. Rep. 853. See, also, *Telegraph Co. v. Jewett*, 115 N. Y. 166; *Woodruff v. Jewett*, 115 N. Y. 267; *Farmers' L. & T. Co. v. Central R. Co.*, 2 McCrary, 181; s. c., 7 Fed. Rep. 587; *Brown v. Gay*, 76 Tex. 444. "The case of *Miller v. Loeb*, 64 Barb. 454, cited and relied upon by counsel, is not at all in conflict with the authorities generally. That case is authority for the proposition that the discharge of a receiver cannot be successfully pleaded in an action brought to recover for a personal liability incurred by that officer during his receivership. . . . The receiver had sold property claimed by third parties and not belonging at all to the estate which he held as receiver, and on this state of facts the court held the discharge no bar to the action. . . . We are not to be understood as intimating, as counsel for appellant contends the law is, that the discharge of the receiver abates a pending suit." Per Woods, J., in *Bond v. State*, *supra*. "The sole liability of a receiver except in cases in which he is personally at fault is official,

and when his official career ceases and the property through which alone his official liability may be discharged has passed from his hands in pursuance of the orders of the court that appointed him and he has been by that court discharged from his trust, no judgment can be rendered against him; with the termination of his official existence ends his official liability." *Ryan v. Hays*, 63 Tex. 47; *Railroad Co. v. Osmond*, 63 Tex. 274; *White v. Railway Co.*, 52 Iowa, 97; *Brown v. Gay*, 76 Tex. 444, 447. In the case last cited it was held that where, pending a suit for personal injuries against the receiver of a corporation, he is discharged, the court should decline to proceed with the case until the corporation is made a defendant. See, also, *Bond v. State* (Miss.), 9 So. Rep. 853, holding that if intervening rights do not interfere the cause may be revived by proper application against his successor.

<sup>2</sup> *Reynolds v. Stockton*, 140 U. S. 254.

<sup>3</sup> *Fordyce v. Beecher* (Tex. Civ. App.), 21 S. W. Rep. 179.

<sup>4</sup> §§ 6, 15, *supra*.

to relinquish control of the property, without passing upon the accounts of the receiver or expressly discharging him, is no defense to an action against him.<sup>1</sup> It has been held that where the receiver is discharged by the court appointing him, and the property returned to defendant, the jurisdiction of the court is ended; and that an order, in such decree, that the property shall be relieved from any liability on claims not established by intervention in the suit in which receiver was appointed, does not affect defendant's liability for injuries to plaintiff arising from the receiver's negligence, where it has received in improvements earnings out of which plaintiff was entitled to have such damages paid, though his claim is not established by such intervention.<sup>2</sup>

§ 752. *Costs of receivership.*—The authorities uniformly hold that when no question is made as to the legality and propriety of the appointment of a receiver, the expenses of the receivership, including the compensation of the receiver, should be paid from the funds in his hands,<sup>3</sup> and in this behalf the legality or propriety of his appointment does not depend at all upon the event of the suit.<sup>4</sup> But where the court appoints a receiver upon a bill which shows on its face a want of jurisdiction to make the appointment, the rule is otherwise and such costs must be paid by the complainant,<sup>5</sup> or at least need not be wholly charged against the fund.<sup>6</sup>

<sup>1</sup> *Fordyce v. Chancy* (Tex. Civ. App.), 21 S. W. Rep. 181. 7 N. W. Rep. 604; *Ferguson v. Dent*, 46 Fed. Rep. 88.

<sup>2</sup> *Texas & Co. Ry. Co. v. Watts* (Tex.), 18 S. W. Rep. 812; and *Kretz v. Texas & Co. Ry. Co.* (Tex.), 14 S. W. Rep. 1067, following *Railway Co. v. Johnson*, 76 Tex. 421; s. c., 13 S. W. Rep. 468, and holding that the court has no power to require in such decree that claims must be established by intervention within a given time where that period is not long enough to constitute an equitable bar, since such order is an infringement of the power to fix the limitation of actions, which is vested entirely in the legislative branch of the government.

<sup>3</sup> *Beckwith v. Carroll*, 5 Cal. 12; *Radford v. Folsom*, 55 Iowa, 276; s. c.,

<sup>4</sup> *Ferguson v. Dent*, 46 Fed. Rep. 88, where upon dismissal of the plaintiff's bill the court refused to tax the receiver's compensation against the heir. Where a receiver is appointed to take charge of an hotel and its property, and conduct the business, but has no authority to sell any of the property except in the ordinary course of such business, the title to such property does not vest in him, and does not become assets in his hands to pay the expenses of the receivership. *Mathews v. Cooper*, 21 N. Y. Supl. 71.

<sup>5</sup> *Lockhart v. Gee*, 8 Tenn. Ch. 332.

<sup>6</sup> *French v. Gifford*, 81 Iowa, 428.

## CHAPTER XXIII.

### INJUNCTIONS.

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| <p>§ 753. Injunctions mandatory or preventive.</p> <p>754. The mandatory injunction as a remedial process.</p> <p>755. The granting of injunctions discretionary.</p> <p>756. Discretion controlled.</p> <p>757. Certain limitations of discretion.</p> <p>758. Injunctive jurisdiction — Special equities as ground of.</p> <p>759. Jurisdiction over executive officers — Limits of.</p> <p>760. Jurisdiction to enjoin patent infringement.</p> <p>761. No injunction of criminal proceedings.</p> <p>762. The same subject continued — Exceptions.</p> <p>763. Jurisdiction beyond the State.</p> <p>764. The same subject continued.</p> <p>765. Concurrent jurisdiction.</p> <p>766. Bill and special prayer for injunction.</p> <p>767. Motion, notice and affidavits.</p> <p>768. Injunction bonds — Generally.</p> <p>769. Formal sufficiency of injunction bonds.</p> | <p>§ 770. Assessment of damages on injunction bonds.</p> <p>771. Measure of damages.</p> <p>772. Form of injunction orders.</p> <p>773. Writ of injunction.</p> <p>774. Dissolution upon motion.</p> <p>775. Grounds of motion to dissolve.</p> <p>776. The same subject continued — Want of equity.</p> <p>777. Dissolution for laches.</p> <p>778. The same subject continued.</p> <p>779. Notice of motion to dissolve.</p> <p>780. Affidavits upon application to dissolve.</p> <p>781. Dissolutions upon answer.</p> <p>782. The same subject continued — Requisites of answer.</p> <p>783. The same subject continued — Where there are several defendants.</p> <p>784. The same subject continued — Exceptions to answer.</p> <p>785. The same subject continued — Discretion of the court.</p> <p>786. Considerations influencing discretion to dissolve.</p> <p>787. Perpetual injunctions.</p> |
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§ 753. **Injunctions mandatory or preventive.**— Injunctions with reference to their nature are either mandatory, requiring a particular thing to be done, or preventive, requiring it not to be done.<sup>1</sup> Preventive injunctions have been more common, and more easily obtained from the courts than mandatory;<sup>2</sup> and down to quite modern times there has been such a prejudice against mandatory injunctions that it has been customary to disguise them under a preventive form. Thus

<sup>1</sup> Beach, *Modern Equity Jurisprudence*, § 368.      <sup>2</sup> Story, *Eq. Jur.*, § 862.

where a minister in New Jersey was wrongfully excluded from his church, the trustees were not commanded by the injunction to open the church to him, but to refrain from keeping it closed.<sup>1</sup> There is, however, no good reason for this prejudice, and it has nearly ceased to exist.<sup>2</sup> An injunction decree may be both preventive and mandatory. Thus where an obnoxious structure has been commenced, the injunction may restrain the continuance, and also order the removal of what has already been erected.<sup>3</sup>

**§ 754. Mandatory injunction as a remedial process.**— It is often quite as essential to justice to undo what has been wrongfully done as to prevent further wrong doing, and in this respect the mandatory injunction has been styled remedial. Thus a sheriff may be compelled by such an injunction to restore property which he has seized and is about to sell;<sup>4</sup> and a pastor may be compelled to deliver possession of the parsonage and church records where another has been recognized as pastor by the trustees;<sup>5</sup> and a municipal board may be compelled to remove a fence by which an abutting owner is deprived of access to a promenade, which he had the right to use as a highway;<sup>6</sup> and common carriers may be compelled, under the operation of the interstate commerce law, to keep up a continuous passage of freight between them as it comes in the usual course.<sup>7</sup> In many of the States and in

<sup>1</sup> *Whitecar v. Michenor*, 87 N. J. Eq. 6, 14.

<sup>2</sup> *Smith v. Smith*, L. R. 20 Eq. 500, where Jessel, M. R., argues that a mandatory injunction should be issued on precisely the same equities that would justify the granting of a preventive. Beach on Injunctions, § 101 *et seq.*

<sup>3</sup> *Salisbury v. Andrews*, 128 Mass. 336. In *Ex parte Chamberlain* (1893), 55 Fed. Rep. 704, the injunction, which was issued to protect the possession of a receiver, restrained the sheriff "from further intermeddling, interfering with, keeping and holding the personal property distrained upon by him belonging to the petitioner as re-

ceiver of the S. C. Railway Company, or in his care and custody as receiver and common carrier, and that this injunction remain of force until the further order of this court. It is further ordered that the said property be restored to the custody of the receiver of this court, and that the marshal put him in possession thereof."

<sup>4</sup> *Ex parte Tyler* (1893), 18 S. Ct. Rep. 691, 693.

<sup>5</sup> *Gross v. Wieand* (1892), 151 Pa. St. 632.

<sup>6</sup> *Ramuz v. Southend Local Board* (1892, Ch. D.), 87 L. T. 169.

<sup>7</sup> *Toledo &c. R. Co. v. Pennsylvania Co.* (1893), 54 Fed. Rep. 730.

England a mandatory injunction is now as easily obtainable as a preventive.<sup>1</sup>

**§ 755. The granting of injunctions discretionary.**—The granting of preliminary injunctions is largely a matter of discretion on the part of the court of original jurisdiction to which the application is made, and its order granting or refusing the injunction will not be disturbed on appeal, unless there seems to have been an abuse of discretion by the court below.<sup>2</sup> In Georgia the granting of injunctions is expressly declared to be discretionary.<sup>3</sup> Ordinarily the court must exercise its discretion in assuming one of two opposite versions of fact to be true, and if its conclusion leads to the granting of an injunction it will not be reversed on appeal.<sup>4</sup> Thus where the complainant is charged with standing by and see-

<sup>1</sup> *Wheelock v. Noonan*, 108 N. Y. 179; *Avery v. N. Y. Central R. Co.*, 106 N. Y. 142; *Cain v. Cain*, 20 N. Y. Supp. 45; *Brauns v. Gleisig*, 180 Ind. 167; s. c., 29 N. E. Rep. 1061; *Delafield v. Commercial Tel. Co.*, 22 Abb. N. C. 450; s. c., 8 N. Y. Supp. 921; *Daniel v. Ferguson* (1891), 2 Ch. D. 27; *Corning v. Troy &c. Factory*, 40 N. Y. 691; *James-town v. Chicago &c. R. Co.*, 69 Wis. 648; *Commissioners v. Commissioners* (Md., 1893), 26 Atl. Rep. 115; *Zanesville Gas Co. v. Zanesville*, 47 Ohio St. 85; *Nicholson v. Getohell*, 96 Cal. 394; *Isenburg v. East India House Estate*, 33 L. J. Eq. 392; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; *Storer v. Great Western R. Co.*, 3 Y. & C. Ch. 48; *Manchester R. Co. v. Workop Board*, 23 Beav. 200; *Foot v. Bronson*, 4 Lans. 47; *Garretson v. Cole*, 1 Harr. & J. 370; *Lutheran Evang. Church v. Gristgau*, 84 Wis. 328; *Kelk v. Pearson*, L. R. 6 Ch. 309; *Beadel v. Perry*, L. R. 3 Eq. 465; *Sellor v. Pawson*, L. R. 3 Eq. 330; *O'Neil v. Breese* (1893), N. Y. Law Journal of May 10, 1893; *Tucker v. Howard*, 128 Mass. 361; *Lord Manners v. Johnson*, L. R. 1 Ch. D. 678;

*Schworer v. Boylston Market Assoc.*, 99 Mass. 285.

<sup>2</sup> *Gloversville v. Johnstown &c. R. Co.* (1892), 49 N. Y. St. Rep. 315. Such is the rule, even though the object of the action may be defeated by refusing a temporary injunction. *Young v. Campbell*, 75 N. Y. 525. If the discretion of the court below leads to a refusal of the injunction it will not be disturbed where the complainant has a remedy in damages and the defendant is solvent and able to respond in damages. *Clay v. Clay*, 86 Ga. 359.

<sup>3</sup> Ga. Code, § 3220. The chancellor's discretion should not be disturbed where the evidence presented to him was conflicting unless some principle of substantial equity has been misstated. *Atwater v. Equitable Co.*, 86 Ga. 581; *Bliley v. Taylor*, 86 Ga. 163; *Dozier v. Owen*, 83 Ga. 157; *Phillips v. Davis*, 61 Ga. 159; *Goldsmith v. Elsas*, 58 Ga. 186.

<sup>4</sup> *Strasser v. Moondis*, 108 N. Y. 611; *Pfohl v. Sampson*, 59 N. Y. 176; *Brown v. Cheese Assoc.*, 59 N. Y. 242. The appellate court will not interfere with an order granting an

ing expensive improvements made on the *locus in quo* without giving notice of his title and claim, and the question of estoppel turns in part on proof to be made at the trial, the discretion of the chancellor in granting a temporary injunction until the facts can be tried by a jury will not be controlled.<sup>1</sup> So, pending a proceeding under the statute to contest the validity of an election held on the question of issuing county bonds, it is held to be a matter of judicial discretion whether the issue of the bonds should be enjoined.<sup>2</sup> And where the record shows a bill to enjoin defendant from ditching a swamp above a certain spring, to which plaintiff had purchased the right to dig a mill-race, and the bill is supported by affidavits that the water ran through the swamp, but is opposed by affidavits that no stream flowed through the swamp, an appellate court cannot reverse for an abuse of discretion in refusing the injunction.<sup>3</sup>

**§ 756. Discretion controlled.**—The discretion to be exercised by courts of equity in granting or refusing injunctions is, however, to be sound as distinguished from arbitrary, and is controlled by time-honored rules which are everywhere recognized as fundamental in equity jurisprudence and practice.<sup>4</sup> Judicial discretion in granting injunctions must often

injunction where the facts are submitted to the court below, and no serious injury to any of the parties can arise therefrom. *Nimocks v. Shingle Co.*, 110 N. C. 280; *Machine Co. v. Lumber Co.*, 109 N. C. 570.

<sup>1</sup> *East Rome Town Co. v. Cothran*, 81 Ga. 859.

<sup>2</sup> *Johnson v. Wilson Co. Com'rs*, 84 Kan. 670.

<sup>3</sup> *Wannock v. Brownlee*, 84 Ga. 196. And see *McMeekin v. Richards*, 81 Ga. 192; *s. c.*, 6 S. E. Rep. 185; *Richards v. Dower*, 64 Cal. 62.

<sup>4</sup> *Rend v. Venture Oil Co.*, 48 Fed. Rep. 248, per Reed, J.:—"There are certain well-settled rules regulating the granting of preliminary injunctions which must govern in passing upon this motion. They are

that the complainant must show a clear legal or equitable interest or right which is to be protected; that there must be a well-grounded apprehension of immediate injury to those rights or interests, and a clear necessity must be shown of immediate protection to such interest or right which would otherwise be seriously injured or impaired. If it appears that the preliminary injunction is not necessary to preserve interests or property *in statu quo* until final hearing, and the rights of the complainant will suffer no serious injury until that time, or that the injury threatened is of such a nature that it can be remedied on final hearing, then the injunction ought not to be granted. And so if

be influenced by considerations of convenience and inconvenience likely to result to the parties and to the public.<sup>1</sup> And when the act sought to be enjoined is likely to cause any serious injury to plaintiff, so that the balance of inconvenience preponderates in his favor, the injunction will ordinarily be granted.<sup>2</sup>

§ 757. **Certain limitations of discretion.**—It seems obvious enough that an injunction to prevent a tortious act should not be refused and the plaintiff left to his legal remedy merely because the tort-feasor would be more injured by the injunction than the plaintiff benefited by it, for that would be to compel an innocent person to give up his rights to a wrongdoer at a valuation.<sup>3</sup> The rule in Pennsylvania in respect to torts is that the granting of an injunction is not of the court's discretion and grace, but the complainant's right *ex debito justitiæ*.<sup>4</sup> So, also, a statute providing for injunctions may

it appears that the complainant's rights are not sufficiently clear, and the considerations of respective convenience or inconvenience to parties complainant and defendant, when balanced, show that serious injury may be done to the defendant by the granting of the injunction, and no serious injury will be done to complainant by withholding it until final hearing, then the injunction ought not to be granted. Other considerations may have at times been held as controlling in special cases, but the general rules, as I have stated, are those which have been held as governing the discretion which is to be exercised in passing upon such motions." And see *Illingworth v. Altha*, 42 Fed. Rep. 141.

<sup>1</sup> *Meyers v. Duluth &c. R. Co.* (Minn., 1893), 55 N. W. Rep. 140.

<sup>2</sup> *Cornwall v. Sachs* (1893), 69 Hun, 283.

<sup>3</sup> *Lynch v. Union Savings Institute* (Mass., 1893), 83 N. E. Rep. 603. Compare *Tucker v. Howard*, 128 Mass. 361; *Brande v. Grace*, 154 Mass. 210,

<sup>4</sup> *Walters v. McElroy* (1892), 25 Atl. Rep. 125, by the court:—"And as to the principle invoked, that a chancellor will refuse to enjoin when a greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself as well as in its incidents tortious. In such case it cannot be said that injury would result from an injunction, for no man can complain that he is being prevented from doing to the hurt of another that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him as compared with the advantages that would accrue to the defendants from its occupation. The plaintiff's right to an injunction being established on account of the damages heretofore sustained follows as an incident and to avoid a multiplicity of suits. *McGowin v. Remington*, 12 Pa. St. 56; *Souder's Appeal*, 57 Pa. St. 498; *Allison's Appeal*, 77 Pa. St. 221."



be so mandatory in its terms as to leave but little discretion to the courts, where a complainant complies with the conditions prescribed by the statute.<sup>1</sup>

**§ 758. Injunctive jurisdiction — Special equities as ground of.**—To authorize the remedy by injunction the violation of a legal right of property is not enough;<sup>2</sup> there must also be some special and recognized ground of equity jurisdiction set forth by proper allegations and showing; for instance, a reasonable apprehension of irreparable injury to the complainant, or that he has no adequate remedy at law, or that an injunction is necessary to avoid a multiplicity of suits.<sup>3</sup> And a court of equity must not assume jurisdiction of matters which have been assigned by statute to another tribunal.<sup>4</sup> In New York and the other States where the distinction between actions at law and suits in equity has been abolished, a party, to entitle himself to the equitable remedy by injunction, must still make such a case as would, while the distinction existed, have made an equitable cause of action and ground for injunctive relief.<sup>5</sup> The mere fact of combining equity and law in a court does not, of itself, give it any greater jurisdiction by injunction than it had before.<sup>6</sup>

<sup>1</sup> *Beebe v. Ginnault*, 39 La. Ann. 795, as distinguished in *New Orleans v. Telephone Co.*, 37 La. Ann. 593.

<sup>2</sup> *McHenry v. Jewett*, 90 N. Y. 58.

<sup>3</sup> *Troy & C. R. Co. v. Boston & C. R. Co.*, 86 N. Y. 107, where *Danforth, J.*, in support of the proposition that some special, substantial equity must be shown as a ground for injunction, cites *New York City v. Mapes*, 6 Johns. Ch. 46; *N. Y. Printing Estab. v. Fitch*, 1 Paige, 97; *Livingston v. Livingston*, 6 Johns. Ch. 497; *Akrill v. Selden*, 1 Barb. 316; *Hart v. The Mayor*, 3 Paige, 214.

<sup>4</sup> *McLaury v. Hart*, 121 N. Y. 636.

<sup>5</sup> *New York L. Ins. Co. v. Supervisors*, 4 Duer, 192; *Pumpelly v. Owego*, 45 How. Pr. 259; *Heywood v. Buffalo*, 14 N. Y. 534; *Albany &*

*R. Co. v. Brownell*, 24 N. Y. 348. In *Troy & C. R. Co. v. Boston & C. R. Co.*, 86 N. Y. 107, *Danforth, J.*, says:—

“Such a case has not been made here. The complaint and proof is of a trespass, but there is neither allegation nor proof of facts showing the injury to be irreparable. There is no allegation showing multiplicity of suits pending or expected, and while there is a finding by the court that a remedy can only be partially obtained by a great multiplicity of actions at law, there is no evidence that any such action has been tried or even brought. This the general rule requires, and we find nothing in the case to make it an exception.”

<sup>6</sup> *Broomhead v. Grant*, 83 Ga. 451; s. c., 10 S. E. Rep. 116. And see

### § 759. Jurisdiction over executive officer — Limits of.—

The general rule is that courts of equity cannot by injunction control the executive discretion of officers of the government in respect of matters which are properly before them and still pending.<sup>1</sup> Thus the action of the secretary of the interior in a matter relating to the land office and still pending before him cannot be interfered with by injunction.<sup>2</sup> But the ministerial acts of public officers are subject to judicial control by means of injunctions.<sup>3</sup>

Campbell v. Campbell, 22 Ill. 664;  
Bryant v. People, 71 Ill. 82.

<sup>1</sup> New Orleans v. Paine (1898), 147 U. S. 261. Court of equity will not interfere by injunction in the appointment or removal of public officers. Attorney-General v. Clarendon, 17 Ves. 491; Tappan v. Gray, 9 Paige, 507, 512; s. c., 7 Hill, 259. The jurisdiction to determine the title to a public office belongs to courts of law and is exercised by *certiorari*, *quo warranto*, etc., according to the mode of procedure established by the common law or by statute. *In re Sawyer*, 124 U. S. 200, 218; *Hagner v. Heyberger*, 7 Watts & S. 104; *Updegraff v. Crans*, 47 Pa. St. 103; *Cochrane v. McCleary*, 22 Iowa, 75; *Delahunty v. Warner*, 75 Ill. 185; *Sheridan v. Colvin*, 78 Ill. 287; *Harris v. Schryock*, 82 Ill. 119; *Moulton v. Reid*, 54 Ala. 320.

<sup>2</sup> *Gaines v. Thompson*, 7 Wall. 847, 352; *Fourniquet v. Perkins*, 16 How. (U. S.) 82.

<sup>3</sup> *Noble v. Union River Railroad* (1892), 147 U. S. 165, 171, per Brown, J.:—"With regard to the judicial power in cases of this kind it was held by this court as early as 1803, in the great case of *Marbury v. Madison*, 1 Cranch, 137, that there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that with respect to the

former there exists and can exist no power to control the executive discretion, however erroneous its exercise may seem to have been; but with respect to ministerial duties an act or refusal to act is, or may become, the subject of review by the courts. The principle of this case was applied in *Kendall v. Stokes*, 12 Pet. 524, and the action of the circuit court sustained in a proceeding where it had commanded the postmaster-general to credit the relator with a certain sum awarded to him by the solicitor of the treasury under an act of congress authorizing the latter to adjust the claim, this being regarded as purely a ministerial duty. In *Decatur v. Paulding*, 14 Pet. 497, a *mandamus* was refused upon the same principle to compel the secretary of the navy to allow to the widow of Commodore Decatur a certain pension and arrearages. Indeed the reports of this court abound with authorities to the same effect. *Kendall v. Stokes*, 8 How. 87; *Brashear v. Mason*, 6 How. 92; *Reese v. Walker*, 11 How. 272; *Commissioner of Patents v. Whitely*, 4 Wall. 523; *United States v. Guthrie*, 17 How. 284; *United States v. The Commissioner*, 5 Wall. 563; *Gaines v. Thompson*, 7 Wall. 847; *The Secretary v. McGarrahan*, 9 Wall. 298; *United States v. Schurz*, 102 U. S. 378; *Butterworth v. Hoe*, 112 U. S.

§ 760. Jurisdiction to enjoin patent infringements.— Though the State courts have jurisdiction to pass upon the title to and the validity of patents, they have no authority to restrain patent infringements.<sup>1</sup> But the State courts have jurisdiction to enjoin the infringement of trade-marks.<sup>2</sup> Under section 4921 of the Revised Statutes of the United States a bill will lie in the federal circuit courts between residents of the same State to prevent an infringement of a patent;<sup>3</sup> but a preliminary injunction will not issue where the validity of the patent is doubtful,<sup>4</sup> nor where the evidence is so conflicting as to require full proofs to determine the question of infringement.<sup>5</sup>

§ 761. No injunction of criminal proceedings.— It is a rule of almost universal application both in England and in this country that a court of equity has no jurisdiction by injunction to restrain a criminal proceeding whether it be by indictment or summary process,<sup>6</sup> unless the criminal proceeding be brought by a party to a suit already pending in the equity court, and to try the same right that is in issue there.<sup>7</sup> Courts of equity deal only with rights of property

50; *United States v. Black*, 128 U. S. 40. In all these cases the distinction between discretionary and ministerial acts is commented upon and enforced. We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority."

<sup>1</sup> *Hat Sweat Manuf. Co. v. Reineohl*, 102 N. Y. 167; *De Witt v. Elmira Manuf. Co.*, 66 N. Y. 459; *Hovey v. Rubber Tip Co.*, 57 N. Y. 119; *Livingston v. Van Ingen*, 9 Johns. 582; *Dudley v. Mayhew*, 3 N. J. 9; *Childs v. Tuttle*, 7 N. Y. Supp. 59; *Kelly v. Kelly Manuf. Co.*, 15 Ill. App. 547.

<sup>2</sup> *Small v. Sanders*, 118 Ind. 105. Trade-marks are not within the provisions of the United States consti-

tution respecting patents and copyrights, and the act of congress conferring exclusive jurisdiction upon federal courts in trade-mark cases is unconstitutional. *United States v. Steffens*, 100 U. S. 82.

<sup>3</sup> *Sherman v. Nutt*, 85 Fed. Rep. 149.

<sup>4</sup> *Thomson Manuf. Co. v. Hatheway*, 41 Fed. Rep. 519; *Glaenger v. Wiederer*, 38 Fed. Rep. 588.

<sup>5</sup> *American F. Hose Co. v. Callahan Co.*, 41 Fed. Rep. 50.

<sup>6</sup> *Gee v. Pritchard*, 2 Swanst. 402, 418; *Attorney-General v. Ithica Ins. Co.*, 2 Johns. Ch. 871, 878; *Davis v. American Society &c.*, 75 N. Y. 362; *West v. Mayor &c.*, 10 Paige, 539; *Phillips v. Mayor &c.*, 61 Ga. 386; *Cohen v. Goldsboro*, 77 N. C. 2; *Tyler v. Hamersley*, 44 Conn. 419; *Chisholm v. Adams*, 71 Tex. 678.

<sup>7</sup> *In re Sawyer*, 124 U. S. 200, per Gray, J.:—"From long before the

and have no criminal jurisdiction.<sup>1</sup> Thus an injunction will not lie, upon the application of a tenant, to restrain a criminal prosecution by a landlord for an alleged trespass.<sup>2</sup>

§ 762. The same subject continued — Exceptions.— There are some cases, however, in which a court of equity may enjoin acts affecting property rights though such acts may also be indictable. Thus a nuisance may be enjoined and abated by a court of equity though it may also be punishable as a misdemeanor.<sup>3</sup> Thus the Massachusetts statute of 1887 conferring equity jurisdiction upon the Supreme and Superior Courts of that State to enjoin and abate places of prostitu-

Declaration of Independence it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the court of chancery, whether those proceedings are by indictment or by summary process. Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause that he should not move for an injunction in chancery in the meantime, said, 'Sure chancery would not grant an injunction in a criminal matter under examination in this court; and if they did this court would break it and protect any that would proceed in contempt of it.' *Holderstaffe v. Saunders*, Cas. temp. Holt, 136; s. c., 6 Mod. 16. Lord Chancellor Hardwicke, while exercising the power of the court of chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff who had by his bill submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay crim-

inal proceedings, saying: — 'This court has not originally and strictly any restraining power over criminal prosecutions;' and again, 'This court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*, nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of.' *Mayor &c. of York v. Pilkington*, 2 Atk. 302; *Montague v. Dudman*, 2 Ves. Sen. 396, 398. The modern decisions in England by eminent equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. *Attorney-General v. Cleaver*, 18 Ves. 211, 220; *Turner v. Turner*, 15 Jurist, 218; *Saull v. Browne*, L. R. 10 Ch. 64; *Kerr v. Preston*, 6 Ch. D. 463."

<sup>1</sup>*Lucas v. Noble*, 81 Fed. Rep. 855; *Kerr v. Preston Corporation*, L. R. 6 Ch. D. 463; *Moses v. Mayor*, 52 Ala. 198; *Joseph v. Burk*, 46 Ind. 59.

<sup>2</sup>*Crighto v. Dohmer* (Miss., 1898), 18 So. Rep. 237.

<sup>3</sup>*Carleton v. Rugg*, 149 Mass. 550; *Minke v. Hopeman*, 87 Ill. 450; *Ewell v. Greenwood*, 26 Iowa, 377.

tion and gambling, and for the illegal sale of liquor, as common nuisances, is upheld as constitutional because it is directed against the property only of offenders, and not against their persons.<sup>1</sup>

**§ 763. Jurisdiction beyond the State.**—A court of equity has no jurisdiction to enjoin the citizens of another State unless it has already acquired jurisdiction of their persons, for the very obvious reason that it cannot enforce obedience to its mandates.<sup>2</sup> The appointment of a receiver by a court of equity of lands within another State does not extend its jurisdiction so that it can enjoin a citizen of the foreign State from levying on the land, unless such citizen was a party to the suit in which the receiver was appointed.<sup>3</sup> So, too, so long as

<sup>1</sup> *Carleton v. Rugg*, 149 Mass. 550, *per curiam*:—"The fallacy of the argument lies in part in disregarding the distinction between a proceeding to abate a nuisance, which looks only to the property that in the use made of it constitutes the nuisance, and a proceeding to punish an offender for the crime of maintaining a nuisance. These two proceedings are entirely unlike. The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property, and its only connection with persons is through property in which they may be interested. That which is declared by a valid statute to be a nuisance is deemed in law to be a nuisance in fact, and should be dealt with as such. . . . The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance." And similar statutes in Kansas and Iowa, authorizing injunctions to restrain the liquor nuisance, have been upheld. *Kansas v. Ziebold*, 123 U. S. 623; *State v. Crawford*, 28 Kan. 726; *Litton v. Fritz*, 65 Iowa, 488.

<sup>2</sup> *Hazlehurst v. Savannah &c. R. Co.*, 48 Ga. 18; *Adams v. Lamar*, 8 Ga. 82. In *Western Un. Tel. Co. v. Pacific &c. Tel. Co.*, 49 Ill. 90, the court said:—"The jurisdiction of our courts is only co-extensive with the limits of our State. They cannot legally send their process into other States and jurisdictions for service. If the exercise of such a jurisdiction were attempted and an injunction granted, and it should be discharged by persons in Indiana, this court would be powerless to enforce the injunction by attachment, and hence the effort to exercise such a power would be readily defeated. . . . The courts of this State cannot restrain citizens of another State who are beyond the limits of this State from performing acts in another State or elsewhere outside of or beyond the boundary lines of this State. Any other practice would necessarily lead to a conflict of jurisdiction."

<sup>3</sup> *Schindelholz v. Cullum* (1893), 55 Fed. Rep. 885, *per Thayer, J.*:—"For present purposes it will suffice to say that in our opinion a court has no power to enjoin a citizen of a foreign State or sovereignty from causing a levy to be made on lands which

a court of equity has not itself acquired jurisdiction of parties and their controversy it is restrained by considerations of comity from attempting to enjoin their proceedings in a court of competent jurisdiction in another State or in the federal courts. This was a settled rule in the New York court of chancery.<sup>1</sup>

§ 764. The same subject continued.—If parties are before a court of equity or within its jurisdiction, they may be enjoined, though the property, real or personal, which is the subject of the controversy, is beyond the territorial jurisdiction of the court.<sup>2</sup> Thus, a court of one State may enjoin attachment proceedings in another State by a creditor against an insolvent debtor, both of whom are citizens of the former State, if there is nothing in the law or policy of the State where the attachment is made opposed to those of the other.<sup>3</sup>

are situated in the foreign State and beyond its territorial jurisdiction, because it has appointed a receiver of such property, unless the person so enjoined is a party, either in person or by representation, to the litigation in which the receiver was appointed. Courts of chancery doubtless have power to compel persons subject to their jurisdiction to execute conveyances of property located in a foreign State, which will generally be respected by the courts of the latter sovereignty if they are executed in conformity with their laws. [§§ 747, 808, *infra*.] *Phelps v. McDonald*, 99 U. S. 298-308; *Miller v. Sherry*, 2 Wall. 237-249; *Watkins v. Holman*, 16 Pet. 25-57; *Mitchell v. Bunch*, 2 Paige, 606-615. By means of such orders and conveyances made thereunder, a court may be able to vest its receiver with the title to realty situated in a foreign jurisdiction, which will be there recognized as valid. But an order appointing a receiver of realty has no extraterritorial operation and cannot affect the title to real property which is located beyond the jurisdiction of

the court by which the order was made. *Booth v. Clark*, 17 How. 322-328. Such orders therefore only operate *in personam*, and upon those persons who are so related to the court, either as parties to the litigation or by virtue of residence and citizenship, that they are bound to yield obedience to its orders. In conformity with these views we are led to conclude that John K. Woodburn acquired a valid lien on the property of the Land Company in the territory of New Mexico, which the circuit court for the district of Colorado was without power to divest. He was in nowise concerned, as a party or otherwise, in the Colorado suit wherein the receiver was appointed."

<sup>1</sup> *Mead v. Merritt*, 2 Paige, 402; *Burgess v. Smith*, 2 Barb. Ch. 276; *Schuyler v. Pelessier*, 3 Edw. Ch. 191; *Coster v. Griswold*, 4 Edw. Ch. 364. See, also, *Durant v. Pierson*, 12 N. Y. Supp. 145.

<sup>2</sup> *Phelps v. McDonald*, 99 U. S. 298, 308.

<sup>3</sup> *Cole v. Cunningham*, 188 U. S. 107. See, also, *Wilson v. Joseph*, 107

It has been held that a citizen of Alabama may be enjoined in that State from further proceeding by attachment in a Louisiana court to reach money due there to plaintiff, another citizen of Alabama, such money being exempt from legal process in Alabama but not in Louisiana.<sup>1</sup>

§ 765. **Concurrent jurisdiction.**— The rule that where two courts have concurrent jurisdiction of a suit the one which first acquires control of the controversy will not be interfered with by the other applies where both are courts of equity. Thus a suit in equity will not lie to restrain the execution of a writ of assistance before issued in another suit in equity, whether the second suit is brought in the same or another court, by a party or a stranger to the first suit.<sup>2</sup> The rule also applies where one is a court of equity and the other a court of law; and if the latter has first assumed jurisdiction it will retain it to the end.<sup>3</sup> Where the jurisdiction is con-

Ind. 490; *Vail v. Knapp*, 49 Barb. 299, 805; *Dobson v. Pearce*, 12 N. Y. 156; *Dinsmore v. Neresheimer*, 83 Hun, 204; *Pennoyer v. Neff*, 95 U. S. 714, 728, per Field, J.: — "The State, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with, and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the State within which it is situated. *Pennsylvania v. Lord Baltimore*, 1 Vea. Sen. 444; *Massie v. Watts*, 6 Cranch, 148; *Watkins v. Holman*, 16 Pet. 25; *Corbett v. Nutt*, 10 Wall. 464."

<sup>1</sup> *Allen v. Buchanan* (Ala., 1893), 11 So. Rep. 777, where the court held the following rule from section 899 of Story, Eq. Jur., to be applicable: — "When, therefore, both parties to a

suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon these parties and direct them, by injunction, to proceed no further in such suit. In such case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court; but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*."

<sup>2</sup> *Endter v. Lennon*, 46 Wis. 299. The rule, however, does not apply unless the relief sought in the two actions is substantially the same. *Pennsylvania Co. v. Jacksonville &c. R. Co.*, 55 Fed. Rep. 181.

<sup>3</sup> *Johnston v. Young*, L. R. 10 Eq. 408.

current and a federal court has first exercised jurisdiction, a State court should not enjoin the proceedings therein.<sup>1</sup>

**§ 766. Bill and special prayer for injunction.**—The general rule is that before the court will issue an injunction a bill must be filed<sup>2</sup> containing a specific prayer for an injunction,<sup>3</sup>

<sup>1</sup> *Amy v. Supervisors*, 11 Wall. 136; *Supervisors v. Durant*, 9 Wall. 415; *Mayor v. Lord*, 9 Wall. 409; *Riggs v. Johnson Co.*, 6 Wall. 166; *New Jersey Zinc Co. v. Franklin Ins. Co.*, 29 N. J. Eq. 422; *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238; *Covell v. Heyman*, 111 U. S. 176, 182, *per curiam*:—"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between State and federal courts it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system so far as their jurisdiction is concurrent, and though they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into another territorial sovereignty. To attempt to seize it by a foreign process is futile and void." When a federal court has ordered the sale of a railroad and its officer has advertised the sale, its jurisdiction is exclusive and cannot be

interfered with by a State court. *Central Nat. Bank v. Hazard*, 49 Fed. Rep. 298. See § 27, *supra*.

<sup>2</sup> *Salmon v. Clagett*, 8 Bland Ch. 125, 161; *Vliet v. Sherwood*, 37 Wis. 165; *Wagoner v. Wagoner* (Md.), 26 Atl. Rep. 284; *Binney's Case*, 3 Bland Ch. 104; 2 *Daniell's Ch. Pr.* (5th ed.) 1618. See *Kane v. Vanderburgh*, 1 Johns. Ch. 11. It was said in *Heyman v. Landers*, 12 Cal. 107, that "when a restraining order or an injunction is sought upon the complaint it is the usual practice to present the complaint in advance of the filing to the judge, and obtain the order on the allowance of the writ. . . . The order or writ can then be issued with the summons." In *Davis v. Reed*, 14 Md. 152, the fact that the bill was not filed until after the injunction was ordered was held to be at most but a mere irregularity which could not operate a reversal of the order. See, also, *Ex parte Sayre* (Ala.), 11 So. Rep. 378. Where the chancellor indorses on a bill the usual order for an injunction to issue on filing the bill, the bill should be filed whether the injunction is made use of or not. *Stimson v. Bacon*, 9 N. J. Eq. 144.

<sup>3</sup> *Savory v. Dyer*, Amb. 70; *Walker v. Devereaux*, 4 Paige, 229; *Thompson v. Maxwell*, 16 Fla. 773; *Wood v. Beadell*, 3 Sim. 273; *Lewiston & Co. v. Franklin Co.*, 54 Me. 402; *Jefferson v. Hamilton*, 69 Ga. 401; *Union Bank v. Kerr*, 2 Md. Ch. 460; *Lefforge v. West*, 2 Ind. 514; *Willett v. Woodhams*, 1 Bradw. (Ill.) 411.



both in the prayer for process and in the prayer for relief.<sup>1</sup> It cannot be granted under the general prayer for relief,<sup>2</sup> unless the necessity for it grows out of the proceedings, and not from the original situation of the parties.<sup>3</sup> A federal equity rule provides that "the prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction or a writ of *ne exeat regno*, or any other special order, pending the suit is required, it shall also be specially asked for."<sup>4</sup>

§ 767. **Motion, notice and affidavits.**—An application for an injunction pending the suit is made by motion.<sup>5</sup> The defendant is usually entitled to notice of the application,<sup>6</sup> espe-

See, also, *Badger v. Wagstaff*, 11 How. Pr. 562. But the omission may be cured by amendment. *African M. E. Church v. Conover*, 27 N. J. Eq. 157.

<sup>1</sup> *Union Bank v. Kerr*, 2 Md. Ch. 460; *Wood v. Beadell*, 8 Sim. 373; *Bailey v. Stiles*, 8 N. J. Eq. 245.

<sup>2</sup> See the cases cited in the last note but one.

<sup>3</sup> *Wright v. Atkins*, 1 Ves. & B. 314; *Angel v. Smith*, 9 Ves. 385; *Paxton v. Douglas*, 8 Ves. 520; *Thompson v. Brown*, 4 Johns. Ch. 619; *Blomfield v. Eyre*, 8 Beav. 250; *Rogers v. Voeburgh*, 4 Johns. Ch. 84; *Casamajor v. Strode*, 1 Sim. & Stu. 381; *Walton v. Johnson*, 15 Sim. 352; *Goodman v. Kine*, 8 Beav. 379; *Barlow v. Gains*, 8 Beav. 329. Where a court of equity possesses jurisdiction over the subject of the action and the person of the defendants, it may enforce obedience to its order or judgment by injunction founded upon petition merely, although no bill has been filed against such person. The filing of the petition in such case is a substitute for the bill. *Re Hemmip*, 2 Paige, 316; *Matter of Creigh*, 1 Ball & B. 108.

<sup>4</sup> Equity Rule 21. See *Shainwald v. Lewis*, 6 Fed. Rep. 766.

<sup>5</sup> 2 Daniell's Ch. Pr. (5th ed.) 1667; *Glidden v. Norvell*, 44 Mich. 203; *Chatterton v. Kreitter*, 2 Abb. N. C. 458.

<sup>6</sup> 2 Daniell's Ch. Pr. (5th Am. ed.) 1666. "Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte* if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court or until it is dissolved by some other order of the court." United States Equity Rule 55. "Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if

cially after he has appeared,<sup>1</sup> or where the application is for a mandatory injunction.<sup>2</sup> But where it is necessary to prevent the destruction of property or imminent and serious mischief, or where the mere act of giving notice would frustrate the object of the injunction, the court will award the injunction without notice, or even before service of the copy of the bill.<sup>3</sup> Where a bill seeks a preliminary injunction it partakes of the nature both of a pleading and of an affidavit in support of that pleading. If the facts and circumstances of the case are not within the personal knowledge of the complainant, he should state them on his information and belief, and annex the affidavit of the person from whom he obtained the information, or the affidavit of some other person having knowledge of the facts alleged, that the material allegations of the bill are true on his own personal knowledge of the facts.<sup>4</sup> If the bill makes out a proper case for an injunction, but it is not sworn to, an injunction may be granted upon a

there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge." United States Rev. Stat., § 718.

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1667. "It is not the practice to allow an injunction affecting the rights of a party who has appeared on an *ex parte* application to the court, upon a supplemental bill; but regular notice of the application should be given to such party. If a temporary injunction is necessary to prevent irreparable injury before regular notice can be given, the court will grant an order to show cause, and allow such temporary injunction in the meantime. In such cases the temporary injunction falls, of course, if the complainant neglects to serve the papers on the adverse party, and to bring on the application at the time fixed by the court, or as soon thereafter as he can be heard." Per

Chancellor Walworth in *Bloomfield v. Snowden*, 2 Paige, 355.

<sup>2</sup> *Chicago &c. R. Co. v. Burlington &c. R. Co.*, 34 Fed. Rep. 481.

<sup>3</sup> 2 Daniell's Ch. Pr. (5th ed.) 1664; *Wing v. Fairhaven*, 8 Cush. 868; *Yuengling v. Johnson*, 1 Hughes, 607; *Schermerhorn v. L'Eapenasse*, 2 Dall. 360.

<sup>4</sup> *Gibson's Suits in Chancery*, § 818; 2 Daniell's Ch. Pr. (5th ed.) 1619, n. See further as to the sufficiency of the affidavits, *Lord Bryron v. Johnston*, 2 Meriv. 29; *Spalding v. Keely*, 7 Sim. 377; *Brooks v. O'Hara Bros.*, 8 Fed. Rep. 529; *Alsbaugh v. Adams*, 80 Ga. 345; *Ruge v. Apalachicola Oyster Co.*, 25 Fla. 656; *Ballard v. Eckman*, 20 Fla. 661; *Manistique Lumber Co. v. Lovejoy*, 55 Mich. 189; *Youngblood v. Schamp*, 15 N. J. Eq. 42. "The application for a special injunction is very much governed upon the same principles which govern insurances, matters which are said to require the utmost degree of good faith, '*uberrima fides*.' In cases of insurance a party is required not

case made by affidavits.<sup>1</sup> Where the complainant gives notice to the adverse party of an application for a preliminary injunction, or where the defendant is required to show cause why such injunction should not be granted, whether a temporary injunction is or is not allowed in the meantime, the defendant may introduce affidavits in opposition to the application.<sup>2</sup>

**§ 768. Injunction bonds—Generally.**—A court of equity ~~may and should always impose just terms as a condition to its interference by interlocutory injunction in behalf of suitors.~~<sup>3</sup> The power of the court to require the applicant for an injunction to furnish an injunction bond conditioned to pay the defendant the costs and damages he may suffer in case the injunction should not be sustained is inherent in the court, and arises from its discretion to grant or not to grant the injunction applied for;<sup>4</sup> and the court may, upon the defend-

only to state all matters within his knowledge which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here, if the party applying for a special injunction abstains from stating facts which the court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the court to grant." Per Baron Rolfe in *Dalgish v. Jarvie*, 2 Mac. & G. 231, 243, 244.

<sup>1</sup> *Smith v. Schwed*, 6 Fed. Rep. 455.

<sup>2</sup> *Village of Seneca Falls v. Matthews*, 9 Paige, 504.

<sup>3</sup> *Macon & Co. R. Co. v. Stamps* (Ga.), 11 S. E. Rep. 442.

<sup>4</sup> *Beach on Injunctions*, § 158; *Russell v. Farley*, 105 U. S. 438, 439;

*Jones v. Florida R. Co.*, 41 Fed. Rep. 70, 73; *Marquis of Downshire v. Lady Sandys*, 6 Ves. Jr. 107; *Wilkins v. Aikin*, 17 Ves. Jr. 423; *Smith v. Day*, L. R. 21 Ch. D. 421, where it was said by Jessel, M. R., that such undertakings were usually inserted only in *ex parte* orders for injunctions, but that by degrees the practice has extended to all cases of interlocutory injunctions; and that "the reason for this extension was that though when the application was disposed of on notice there was not the same opportunity for concealment or misrepresentation, still, owing to the shortness of time allowed, it was often difficult for the defendant to set up his case properly, and as the evidence was taken by affidavit, and generally without cross-examination, it was impossible to decide on which side the truth lay. The court therefore required the undertaking in order that it might be able to do justice if it had been induced to grant the injunction by false statement or suppression." *Tucker v. New Bruns-*

ant's motion, require additional security as a condition of continuing an injunction.<sup>1</sup> Where the complainant's right is clear, and the infraction of that right established, he will not be required to give security for such damages as the defendant may sustain by reason of the injunction.<sup>2</sup> So the defendant's bad faith toward the complainant may deprive him of any equitable title to protection by way of a bond from the complainant.<sup>3</sup> In some States the filing of an injunction bond is made by the express terms of the statute a condition precedent to the granting of an injunction order.<sup>4</sup> But where the statute merely exacts a bond without expressly prescribing it as a condition precedent, the omission is an irregularity which may be cured, and does not render the injunction order void.<sup>5</sup>

wick Trading Co., 44 Ch. D. 249; Byam v. Cashman, 78 Cal. 525. The defendant may be required, as a condition for refusing an injunction, to give an undertaking to abide the further order of the court. Attorney-General v. Manchester & Co. Ry. Co., 1 Eng. Ry. Cas. 486; Jones v. Great Western Ry. Co., 1 Eng. Ry. Cas. 684. As to the practice where the United States as plaintiff applies for an injunction, see United States v. Jellico & Co. Coal Co., 48 Fed. Rep. 898. United States Revised Statutes, 1874, section 718, provides that the court may grant a restraining order "with or without security, in the discretion of the court or judge." State v. Wakeley, 28 Neb. 481; s. C., 44 N. W. Rep. 488, holds that the right of a court to require security in such a case does not depend upon statute. A certified check may be accepted in lieu of an injunction bond. Goldmark v. Kreling, 25 Fed. Rep. 349. Where there is no order or bond or other security for the payment of damages there is no obligation on the part of the plaintiff to pay them unless in a case of malice and want of probable cause. Palmer v. Foley, 71 N. Y. 106; Sturgis v. Knapp, 33 Vt. 486, 522; Lexington

& Co. R. Co. v. Applegate, 8 Dana (Ky.), 389; Daniels v. Fielding, 16 M. & W. 200; Hayden v. Keith, 32 Minn. 277; Meyers v. Block, 120 U. S. 206, 211; St. Louis v. St. Louis Gas Light Co., 82 Mo. 849. See, also, Campbell v. Carroll, 85 Mo. App. 640; Fauber v. Gentry (Va.), 15 S. E. Rep. 899; 1 Beach on Injunctions, § 175.

<sup>1</sup> 1 Beach on Injunctions, § 169; Russell v. Farley, 105 U. S. 433; Goldmark v. Kreling, 25 Fed. Rep. 349; Hayden v. Keith, 22 Minn. 277; Leavitt v. Dabney, 40 How. Pr. 277; Loveland v. Burnham, 1 Barb. Ch. 65.

<sup>2</sup> Dodd v. Flavell, 17 N. J. Eq. 255.

<sup>3</sup> Pasteur Chamberland Filter Co. v. Funk, 52 Fed. Rep. 146.

<sup>4</sup> Gen. Stats. Kansas, 1889, § 4387; State v. Rush County Comm'rs, 35 Kan. 150; State v. Kearney County Comm'rs, 42 Kan. 789; State v. Eggleston, 84 Kan. 714; Van Fleet v. Stout, 44 Kan. 528; Miller v. Parker, 78 N. C. 58; Hirsch v. Whitehead, 65 N. C. 516; Pell v. Lander, 8 B. Mon. (Ky.) 554. See, also, Phillips v. Pullen, 45 N. J. Eq. 157.

<sup>5</sup> Manly v. Leggett, 17 N. Y. Supl. 68; O'Donnell v. McMurn, 3 Abb. Pr. 391; New York Attrition Co. v. Van Tuyl, 2 Hun, 378; Pratt v. Under-

§ 769. **Formal sufficiency of injunction bonds.**—Where the statute does not prescribe the conditions of the bond the judge or court may fix the terms on which the order will be granted.<sup>1</sup> A statutory bond containing an obligation beyond that required by the statute is to that extent inoperative.<sup>2</sup> The bond cannot be enforced if the penalty be left blank,<sup>3</sup> but if the word dollars be omitted, obviously by mistake, it is not fatal to recovery.<sup>4</sup> An injunction bond may be sufficient although not signed by the plaintiff.<sup>5</sup> It is not essential that the name of the surety appear in the body of the bond,<sup>6</sup> nor that the approval of the court be indorsed upon it.<sup>7</sup> The injunction bond may be valid although the injunction bill is dismissed for want of jurisdiction.<sup>8</sup> The condition of an injunction bond taken by the federal courts must conform to the established principles of equity by which they are governed,

wood, 4 N. Y. Civ. Pro. 167; Meinhard v. Youngblood, 87 S. C. 228. See, also, Gamble v. Campbell, 6 Fla. 847; Beauchamp v. Supervisors, 45 Ill. 274. Where the writ has been properly granted, the fact that the penalty in the bond is too small does not injure the party against whom the writ is allowed, and the decree will not be reversed for that reason. Drake v. Phillips, 40 Ill. 388.

<sup>1</sup>Newell v. Partee, 10 Humph. (Tenn.) 825; Foster v. Shephard, 88 Tex. 687; Russell v. Farley, 105 U. S. 483.

<sup>2</sup>Powers v. Crane, 67 Cal. 65; Lambert v. Haskell, 80 Cal. 611, 620; People v. Cobannes, 20 Cal. 525. See Holloways v. Myers, 11 West Va. 376; Byam v. Cashman, 78 Cal. 525.

<sup>3</sup>Copeland v. Cunningham, 68 Ala. 329.

<sup>4</sup>Harman v. Howe, 27 Gratt. 676. An injunction bond the condition of which is that, if the obligors shall pay the obligee "all damages they may sustain by the suing out of said injunction, if the same is dissolved, then this obligation to remain in full

force and effect," although awkwardly expressed, is not void. Washington v. Timberlake, 74 Ala. 259. Under an order of the United States district court that a bond be given by plaintiffs "to save the parties harmless from the effects of the injunction issued in this cause," a bond was given conditioned to pay "to the said . . . defendant in said injunction all such damages as he may recover against us, in case it should be decided that the said writ of injunction was wrongfully issued." It was held that the bond should be construed to mean that such damages would be paid as the obligee should recover by a suit on the bond itself, and that thus construed the bond was valid and conformable to the order and covered all damages arising from the wrongful issue of the injunction. Meyers v. Block, 120 U. S. 206; s. c., 7 S. Ct. Rep. 525.

<sup>5</sup>Peirce v. Durbin, 1 Idaho (N. S.), 550.

<sup>6</sup>Griffin v. Wallace, 66 Ind. 410.

<sup>7</sup>Griffin v. Wallace, 66 Ind. 410.

<sup>8</sup>Kimm v. Steketee, 44 Mich. 527.

and cannot be extended to conform to the law of the State in which the court is sitting.<sup>1</sup>

§ 770. **Assessment of damages on injunction bonds.**—In the federal courts it has been held that the court can either decide for itself what damages, if any, should be given upon the dissolution of an injunction, secured by a bond given under its order, or it can deliver the bond to the defendants for the purpose of suit thereon in a court of law.<sup>2</sup> It has been said that a federal court will never send the bond for suit in another jurisdiction, and in very rare cases will it send the bond before a jury;<sup>3</sup> that the court may content itself, after fixing costs on the complainant, with an order that no further damages can be recovered against him,<sup>4</sup> and that the proper practice is for the court, without deciding in advance or intimating an opinion upon the question whether further damages shall be allowed, to order the defendants to produce before the master such evidence of damage as he may claim, with leave to the complainant to reply thereto, and that the testimony so taken be reported to the court.<sup>5</sup> An application for an inquiry as to damages "should be made speedily and not after the court has forgotten the circumstances."<sup>6</sup> In Kentucky the defendant's remedy is by a suit upon the bond, except where the statute provides for an assessment of damages by the court.<sup>7</sup>

<sup>1</sup> *Bein v. Heath*, 12 How. 168. See, also, *Russell v. Farley*, 105 U. S. 433, 437. table terms. *Brown v. Easton*, 30 N. J. Eq. 725.

<sup>2</sup> *Coosaw Mining Co. v. Farmers' Mining Co.*, 51 Fed. Rep. 107. See, also, *Russell v. Farley*, 105 U. S. 446; *Lehman v. McQuown*, 31 Fed. Rep. 188; *Lea v. Deakin*, 13 Fed. Rep. 514. *Cf. Merryfield v. Jones*, 2 Curt. 306; *Bein v. Heath*, 13 How. 168. An order having been made that an injunction bond should be delivered to the obligees for prosecution at law, and a suit having been instituted thereon, it was held that the order, although made without regard to the equities of the case, could not be rescinded except for equities shown and on equi-

<sup>3</sup> *Coosaw Mining Co. v. Farmers' Mining Co.*, 51 Fed. Rep. 107.

<sup>4</sup> *Russell v. Farley*, 105 U. S. 446; *Coosaw Mining Co. v. Farmers' Mining Co.*, 51 Fed. Rep. 107.

<sup>5</sup> *Coosaw Mining Co. v. Farmers' Mining Co.*, 51 Fed. Rep. 107. See *Graham v. Campbell*, L. R. 7 Ch. D. 490.

<sup>6</sup> *Smith v. Day*, L. R. 21 Ch. D. 421, per Jessel, M. R.; *Ex parte Hall*, L. R. 23 Ch. D. 644, 652. See *Newby v. Harrison*, 3 De G., F. & J. 287.

<sup>7</sup> *Logsdon v. Willis*, 14 Bush, 188; *Alexander v. Gish*, 88 Ky. 18, 18; *Rankin v. Este*, 13 Bush, 428; Civil Code Kentucky, § 295.

A similar rule obtains in Alabama.<sup>1</sup> In Minnesota the course commonly pursued is to waive the assessment of damages in the court of chancery and have the same ascertained directly in the suit upon the bond,<sup>2</sup> but an inquiry may be had upon a reference in the original suit, which, however, will determine only the amount of the damages, if any, and not the right to recover them.<sup>3</sup> In many other States the matter is largely regulated by statute.<sup>4</sup>

§ 771. **Measure of damages.**—The general rule is that an injunction bond does not cover remote, consequential or speculative damages, but only such as are the proximate and natural result of the injunction,<sup>5</sup> and while the defendant is in the exercise of ordinary care and prudence.<sup>6</sup> Where an injunction was terminated by the appointment of a receiver, damages arising from the acts of the receiver in selling the property at a sacrifice, the sale of which had been enjoined, are not recoverable in an action on the bond.<sup>7</sup> Where the defendant, in anticipation of the injunction, made extraordinary efforts and accomplished the object sought to be enjoined before the writ was served, he could not successfully contend that he was delayed by the injunction and recover damages

<sup>1</sup> *Boygacke v. Welch*, 94 Ala. 429. See, also, *Zeigler v. David*, 28 Ala. 127.

<sup>2</sup> *Hayden v. Keith*, 82 Minn. 277.

<sup>3</sup> *Hayden v. Keith*, 82 Minn. 277.

<sup>4</sup> *Beach on Injunctions*, § 212 *et seq.* See Ill. R. S. 1891, ch. 69, § 12; *Kohlsaat v. Crate* (Ill.), 32 N. E. Rep. 481; *Walker v. Pritchard*, 185 Ill. 108; New York Code Civ. Pro., § 628; *Lawton v. Green*, 64 N. Y. 326; *Methodist Churches v. Basker*, 18 N. Y. 468; *Loveland v. Burnham*, 1 Barb. Ch. 65; *Leavitt v. Dabney*, 40 How. Pr. 277; *Jackman v. Eastman*, 62 N. H. 278; *Johnson v. Devens*, 60 Miss. 200; *Davis v. Hart*, 66 Miss. 642; *Parish v. Reeve*, 68 Wis. 815; *Lambeth v. Sentell*, 88 La. Ann. 691; *Dorris v. Carter*, 67 Mo. 544; *Hill v. Thomas*, 19 S. C. 230; *White v. Bowman*, 10 Lea (Tenn.), 55; *Sartor v. Strassheim*, 8 Colo. 185.

<sup>5</sup> *Sensening v. Parry*, 118 Pa. St. 115; *Morgan v. Negley*, 58 Pa. St. 158; *Kerngood v. Gusdorf*, 5 Mackey (D. C.), 161; *Streeter v. Marshall Silver Min. Co.*, 4 Colo. 535; *Wood v. State*, 66 Md. 61; *Stewart v. State*, 20 Md. 97; *Chicago City R. Co. v. Howison*, 86 Ill. 215; *Carondelet Canal & Co. v. Touchi*, 38 La. Ann. 388; *Hotchkiss v. Platt*, 8 Hun. 46; *Foster v. Stafford Nat. Bank*, 58 Vt. 658; *Burgen v. Sharer*, 14 B. Mon. (Ky.) 497; *Eaton v. Reservoir Co.* (Colo. App.), 38 Pac. Rep. 278.

<sup>6</sup> *Center v. Hoag*, 52 Vt. 401; *Kulp v. Bowen*, 122 Pa. St. 78; *Alliance Trust Co. v. Stewart* (Mo.), 21 S. W. Rep. 798; *Chicago & C. R. Co. v. McGrew*, 104 Mo. 282, 291; *Douglass v. Stephens*, 18 Mo. 366; *Waters v. Brown*, 44 Mo. 308.

<sup>7</sup> *Kerngood v. Gusdorf*, 5 Mackey

for the delay.<sup>1</sup> Exemplary damages are not recoverable in an action on the bond.<sup>2</sup> If the bond is filed for the amount specified in the order granting the injunction, the recovery cannot exceed the penalty of the bond.<sup>3</sup> Loss accruing to the defendant by being prevented from entering into a particular contract is not recoverable,<sup>4</sup> nor mere speculative profits.<sup>5</sup> The expense incurred in hiring a special train to reach a judge to make an application to dissolve an injunction may be allowed as damages on the undertaking where large interests would have suffered from delay.<sup>6</sup> In the federal courts counsel fees are not allowed as damages in actions on injunction bonds;<sup>7</sup> but the prevailing rule in other jurisdictions is that a reasonable amount of counsel fees necessarily expended in getting rid of the injunction<sup>8</sup> before final hearing<sup>9</sup> may be

(D. C.), 161. See, also, *Lehman v. McQuown*, 81 Fed. Rep. 188; *Hotchkiss v. Platt*, 8 Hun, 46.

<sup>1</sup> *Ford v. Loomis*, 62 Iowa, 586.

<sup>2</sup> *Galveston & Co. R. Co. v. Wave*, 74 Tex. 47; s. c., 11 S. W. Rep. 918. But see *Brown v. Tyler*, 84 Tex. 168; *Cox v. Taylor*, 10 B. Mon. 17, 21; *Crate v. Kohlsaat*, 44 Ill. App. 460.

<sup>3</sup> *Glover v. McGaffey*, 56 Vt. 294; *Sturgis v. Knapp*, 84 Vt. 486; s. c., 85 Vt. 439.

<sup>4</sup> *Smith v. Day*, 21 Ch. D. 431.

<sup>5</sup> *Lehman v. McQuown*, 81 Fed. Rep. 188; *Manufacturers' & Bank v. Folk*, 50 N. Y. St. Rep. 802, 806.

<sup>6</sup> *Crounse v. Syracuse & Co. R. Co.*, 32 Hun, 497.

<sup>7</sup> *Oelrichs v. Spain*, 15 Wall. 211, followed in *Richards v. Green* (Ariz.), 32 Pac. Rep. 266. See, also, *Oliphint v. Mansfield*, 36 Ark. 191; *Sensenig v. Parry*, 118 Pa. St. 115; *Wood v. State*, 66 Md. 61; *Wallis v. Dilley*, 7 Md. 287; *Jones v. Rosedale St. R. Co.*, 75 Tex. 883; *Galveston & Co. R. Co. v. Wave*, 74 Tex. 47; s. c., 11 S. W. Rep. 918; *Davis v. Rosedale St. R. Co.*, 75 Tex. 381.

<sup>8</sup> 10 Am. & Eng. Encyc. of Law, 999 and cases there cited; *Cummings v. Burleson*, 78 Ill. 281; *Ryan v. Anderson*, 25 Ill. 330; *Joslyn v. Dickenson*, 71 Ill. 25; *Walker v. Pritchard*, 135 Ill. 108; s. c., 25 N. E. Rep. 573; *Corcoran v. Judson*, 24 N. Y. 106; *Aldrich v. Reynolds*, 1 Barb. Ch. 618; *Edwards v. Bodine*, 11 Paige, 324; *Baylis v. Scudder*, 6 Hun, 800; *Rose v. Post*, 56 N. Y. 608; *Newton v. Russell*, 87 N. Y. 527; *Randall v. Carpenter*, 88 N. Y. 298; *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282; *Hovey v. Rubber Tip Pencil Co.*, 50 N. Y. 385; *Derry Bank v. Heath*, 45 N. H. 524; *Solomon v. Chesley*, 59 N. H. 24; *Colby v. Meserve* (Iowa), 52 N. W. Rep. 499; *Behrens v. McKenzle*, 23 Iowa, 338; *Carroll Co. v. Iowa & Co. Land Co.*, 53 Iowa, 685; *Ford v. Loomis*, 62 Iowa, 586; *Fountain v. West*, 68 Iowa, 860; *Wallace v. York*, 45 Iowa, 81; *Cook v. Chapman*, 41 N. J. Eq. 152; *Prader v. Grimm*, 55 Cal. 585; *Bustamente v. Stewart*, 55 Cal. 115; *Porter v. Hopkins*, 68 Cal. 53; *Garrett v. Logan*, 19 Ala. 844; *Bolling v. Tate*, 65 Ala. 417; *Fergus-*

<sup>9</sup> *Noble v. Arnold*, 28 Ohio St. 264; *Riddle v. Cheadle*, 25 Ohio St. 278; *Cook v. Chapman*, 41 N. J. Eq. 152.



awarded even on injunction bonds given in federal courts.<sup>1</sup> In the federal courts damages suffered before as well as after the bond was given may be recovered.<sup>2</sup>

§ 772. Form of injunction orders.—An injunction should be clear and certain in its terms, that the party upon whom it is served may readily know what he can or cannot do thereunder. No respondent is to be entrapped with a contempt by vague or general orders.<sup>3</sup> But awkward recitals in the order will not vitiate a proper and explicit command so as to render it void.<sup>4</sup> To ascertain the meaning of any part of the

son v. Baber, 24 Ala. 402; Bullock v. Ferguson, 30 Ala. 227; Swan v. Timmons, 81 Ind. 248; Beeson v. Beeson, 59 Ind. 97; Underhill v. Spencer, 25 Kan. 71; Nimocks v. Welles, 42 Kan. 89; Valentine v. McGrath, 52 Miss. 112; Strong v. Harrison, 62 Miss. 61; Livingston v. Exum, 19 S. C. 223; Holloway v. Holloway, 108 Mo. 274; Bufford v. Keokuk & Co., 8 Mo. App. 159; Bohan v. Casey, 5 Mo. App. 101; Wash v. Lackland, 8 Mo. App. 122; Uhrig v. St. Louis, 47 Mo. 528; Meaux v. Pittman, 35 La. Ann. 360; Wittich v. O'Neal, 22 Fla. 592. See, also, for a more minute consideration of damages upon injunction bonds, 1 Beach on Injunction, § 208 *et seq.* But the party is not entitled to recover compensation for his own time and service, nor to compensation for the mental strain and anxiety he may have suffered in consequence of the injunction. Cook v. Chapman, 41 N. J. Eq. 152.

<sup>1</sup> Mitchell v. Hawley, 79 Cal. 301; Wash v. Lackland, 8 Mo. App. 122.

<sup>2</sup> Meyers v. Block, 120 U. S. 206. *Contra* in California. Lambert v. Haskell, 80 Cal. 611.

<sup>3</sup> Baldwin v. Miles, 58 Conn. 496, 502; Rogers Mfg. Co. v. Rogers, 38 Conn. 125. Where a party was enjoined from selling intoxicating liquors upon certain premises described

as "part of lot No. 2 in the N. E. quarter of the N. W. quarter of section 23," etc., it was held, by a divided court, not void for uncertainty in omitting to specify the particular building or place intended. Ver Straelen v. Lewis, 77 Iowa, 180; s. c., 41 N. W. Rep. 594; Lyons v. Botchford, 27 Hun, 57; Laurie v. Laurie, 9 Paige, 284. It should be so clear as not to require a resort to the complainant's bill to ascertain what it means. Sullivan v. Judah, 9 Paige, 444.

<sup>4</sup> State & Co. v. Pierce (Kan.), 82 Pac. Rep. 924. If the form of a permanent injunction order is defective it should be corrected by a motion for re-settlement, otherwise it cannot be materially altered without a rehearing. Gerber v. Metropolitan El. R. Co., 23 N. Y. Supl. 166; Simmons v. Craig (N. Y.), 33 N. E. Rep. 76. An omission to recite in the order the grounds for the injunction, as required by the New York Code of Civil Procedure, section 610, is an irregularity and not a jurisdictional defect. Atlantic Tel. Co. v. Baltimore & Co. R. Co., 46 N. Y. Super. Ct. 877, 409; Phoenix Foundry v. North Riv. Const. Co., 6 N. Y. Civ. Pro. 106, 112. As to the sufficiency of the recitals under the statute, see Hotchkiss v. Hotchkiss, 19 N. Y. St. Rep.

injunction the entire injunction should be taken into account.<sup>1</sup> The appellate court in determining whether the defendant has violated an injunction will look both to the order itself and the finding of facts on which it is based, and also at the finding and judgment of the court below.<sup>2</sup> An injunction should not be broader than the grievance complained of in the bill,<sup>3</sup> or go beyond the relief demanded by the complainant.<sup>4</sup>

§ 773. **Writ of injunction.**— Upon the entry of an order for an injunction the party who obtained it is entitled to have the writ issued from the clerk's office and served.<sup>5</sup> The form of the writ is unimportant provided it contains enough to give the defendant notice of the fact that he is enjoined from doing the acts complained of in the bill. The writ should state the fact of the bill being filed by the complainant against the defendant, in what court filed, a brief statement of the allegations showing the wrong complained of, the prayer for an injunction, the granting of an order for an injunction, the command to the officer to make known to the defendant what he is enjoined from doing, the direction to the officer when to return the writ, and it should be duly tested and signed.<sup>6</sup> "The orders pronounced by the court in cases of interlocutory injunctions have varied at different periods. The form most frequently adopted enjoined the party 'till further order.'<sup>7</sup> In some cases the injunction has been till 'appearance and further order,'<sup>8</sup> in others till 'answer and further order.'<sup>9</sup>

787; s. c., 50 Hun, 604; *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 51 Hun, 443.

<sup>1</sup> *Baldwin v. Miles*, 58 Conn. 496, 501.

<sup>2</sup> *Baldwin v. Miles*, 58 Conn. 496, 498, 499.

<sup>3</sup> *Rainey v. Herbert*, 55 Fed. Rep. 443; *Fischer v. Blank*, 22 N. Y. Supl. 1040; *Burdett v. Hay*, 38 L. J. Ch. 41; *State v. Rush County Comm'rs*, 35 Kan. 150. But an order in violation of this rule, though irregular, is not necessarily void. 1 *Beach on Injunctions*, § 114; *Mayor &c. v.*

*Staten Island Ferry Co.*, 64 N. Y. 622; *People v. Sturtevant*, 9 N. Y. 263; *Richards v. West*, 2 Green Ch. 456.

<sup>4</sup> *McKenzie v. Ballard*, 14 Colo. 426.

<sup>5</sup> 2 *Daniell's Ch. Pr.* (2d ed.) 1816, 1817, 1964. Service should be made within a reasonable time. *McCormick v. Jerome*, 8 Blatchf. 436.

<sup>6</sup> *Gibson's Suits in Chancery*, § 814; 2 *Daniell's Ch. Pr.* (5th ed.) 1674; 1 *Barb. Ch. Pr.* (2d ed.) 620.

<sup>7</sup> *Lane v. Newdigate*, 10 Ves. 192.

<sup>8</sup> *Lord Grey De Wilton v. Saxon*, 6 Ves. 106.

<sup>9</sup> *Potter v. Chapman*, 1 Dick. 146;

The form now usually adopted is 'until the hearing of the cause or until further order.'<sup>1</sup> In the case of a bill of discovery, however, the form is 'until answer or further order.'<sup>2</sup> The writ should conform to the order granting the injunction.<sup>3</sup> If the object of the suit is to restrain proceedings in another court the injunction will be awarded against the defendant, his attorneys and agents. If the object of the suit is to restrain the commission of waste or other inequitable act, the injunction is awarded against the defendant, his servants, workmen and agents.<sup>4</sup>

**§ 774. Dissolution upon motion.**—A special injunction can only be dissolved by a special motion, either in open court or at a special hearing appointed elsewhere for that purpose by a judge of the court.<sup>5</sup> Upon the argument of a rule to show cause why an injunction should not issue in a case where an injunction had been granted in part, the question whether the existing injunction should not be removed cannot be considered. That can be removed only upon notice and motion to dissolve, in accordance with the rule of the court.<sup>6</sup> A defendant who has once moved unsuccessfully for the dissolution of an injunction cannot make a second motion for the same object, upon the same papers, without leave of the court first obtained.<sup>7</sup>

**§ 775. Grounds of motion to dissolve.**—A motion to dissolve an injunction can be founded only on a want of equity apparent on the face of the bill, or on a full and complete

*Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Drury v. Molins*, 6 Ves. 328; *Lord Tamworth v. Lord Ferrers*, 6 Ves. 419.

<sup>1</sup> *Seton*, 870, 887, No. 1. See *Read v. Dewes*, R. M. Charl. 860, 861; *Read v. Consequa*, 4 Wash. C. C. 174; *Minturn v. Seymour*, 4 Johns. Ch. 178; *James v. Jefferson*, 4 Hen. & M. 488.

<sup>2</sup> *Daniell's Ch. Pr.* (5th ed.) 1671, 1672; *Senior v. Pritchard*, 16 Beav. 478; *Lovell v. Galloway*, 17 Beav. 1; *Oddeen v. Oakley*, 2 De G., F. & J. 158.

<sup>3</sup> *Sickels v. Borden*, 4 Blatchf. 14.

<sup>4</sup> *Gibson's Suits in Chancery*, § 814; *Daniell's Ch. Pr.* 1678; 1 *Barbour's Ch. Pr.* 620.

<sup>5</sup> 1 *Foster's Federal Practice*, § 235, citing *Kerr on Injunctions*, 561; *Daniell's Ch. Pr.* 1675; *Wilkins v. Jordan*, 8 Wash. C. C. 226; *Caldwell v. Walters*, 4 Cranch C. C. 577.

<sup>6</sup> *Manhattan & Co. Manuf. Co. v. Van Keuren*, 23 N. J. Eq. 251.

<sup>7</sup> *Lowry v. Chautauque Bank* (1839), *Clarke's Ch.* 67. See *Carrothers v. Newton & Co.*, 61 Iowa, 681.

denial by the verified answer of a material defendant of the allegations upon which the equity of the bill depends.<sup>1</sup> The motion itself is a waiver of the error or irregularity, if any, which may have attended the order for the issue of the writ, or which may be in the writ alone. These are available only upon motion for a discharge of the injunction, which must precede any act on the part of the defendant in recognition or affirmance of its irregularity.<sup>2</sup>

§ 776. The same subject continued — Want of equity. — Where an injunction is allowed by the chancellor, the defendant before he puts in an answer may move to dissolve the injunction on the ground of want of equity in the bill.<sup>3</sup> Where an injunction is granted *ex parte*, the court will at any time hear a motion to dissolve for want of equity, unless for special cause.<sup>4</sup> Upon a motion to dissolve for want of equity in

<sup>1</sup> East & West R. Co. v. East Tennessee &c. R. Co., 75 Ala. 275; *Ex parte* Sayre (Ala.), 11 So. Rep. 878; Jones v. Ewing, 56 Ala. 362. An injunction, "until answer or further order," is not *ipso facto* dissolved by the mere putting in of a sufficient answer. Oddeen v. Oakley, 2 De G., F. & J. 158. Nor in general by a subsequent amendment to the bill. Davis v. Davis, 2 Sim. 515; Reed v. Consequa, 4 Wash. C. C. 174; Selden v. Vermilya, 4 Sandf. Ch. 593; Mount Olivet Cemetery Co. v. Budeke, 2 Tenn. Ch. 490. See Attorney-General v. Marsh, 16 Sim. 572. Nor by allowing defendant's plea. In such cases a motion and order is required. Fulton v. Greacen, 44 N. J. Eq. 448; Phillips v. Longhorn, 1 Dick. 148; Mason v. Murray, 2 Dick. 536; Ferrand v. Homer, 4 Myl. & C. 148. But see for dissolutions by implication, Atkinson v. Beckett (West Va.), 15 S. E. Rep. 179; Thomsen v. McCormick, 186 Ill. 135. A dismissal of the bill operates as a dissolution unless the injunction is expressly continued. 1 Beach on Injunctions,

§ 830; Bogacki v. Welch, 24 Ala. 429.

<sup>2</sup> Cases cited in the preceding note. See, also, Forney v. Calhoun County, 84 Ala. 215; Conover v. Ruckman, 84 N. J. Eq. 298, 297; Vermilya v. Christie, 4 Sandf. Ch. 876; Becker v. Hager, 8 How. Pr. 68. *Cf.* Johnson v. Casey, 28 How. Pr. 492. In Parker v. Williams, 4 Paige, 439, it was held that "an irregularity in the service of the injunction was waived by the defendant voluntarily appearing and putting in his answer. It was therefore too late for him to make the objection after such a lapse of time, and after those proceedings had taken place."

<sup>3</sup> Minturn v. Seymour, 4 Johns. Ch. 178, where it was contended that this could be done only when the injunction was allowed by a master; Receivers &c. v. Biddle, 4 N. J. Eq. 222; Woodhull v. Neafie, 2 N. J. Eq. 409. See Wing v. Fairhaven, 8 Cush. 363. The motion may be made in vacation. Cooper v. Alden, Harr. Ch. 72, 84.

<sup>4</sup> Receivers &c. v. Biddle, 4 N. J.

the bill, a general notice is sufficient; but if the motion is based upon irregularities not touching the equity of the case, the notice should set out the grounds of the motion.<sup>1</sup>

**§ 777. Dissolution for laches.**—It is requisite that the party obtaining an injunction should use due diligence in expediting his cause; and if he is guilty of gross neglect in proceeding with his suit the injunction will be dissolved.<sup>2</sup> A motion to dissolve or modify a preliminary injunction, made more than a year after the injunction was granted, and after the cause had been brought to issue upon the merits, will not be allowed if unsupported by proof of any new or special circumstances.<sup>3</sup> The complainant, having failed to prosecute his suit with proper diligence, was charged with the costs of a motion to dissolve, although the injunction was retained.<sup>4</sup> An injunction is not waived by a delay in applying for an attachment for its violation.<sup>5</sup>

**§ 778. The same subject continued.**—Where the complainant was in laches in not taking out a subpoena with the injunction in accordance with the rule, the injunction was dissolved with costs.<sup>6</sup> Where the complainant neglects to serve a subpoena upon a defendant in the bill against whom an in-

Eq. 222. It may be heard before service of process. *Shields v. McClung*, 6 West Va. 79. But Court Rule IX in New Jersey now provides that "no motion to dissolve an injunction before answer shall be entertained unless the defendant shall show good cause why an answer hath not been put in."

<sup>1</sup> *Morris Canal & Banking Co. v. Bartlett*, 8 N. J. Eq. 9; *Miller v. Traphagen*, 6 N. J. Eq. 200.

<sup>2</sup> *Corey v. Voorhies*, 2 N. J. Eq. 5; *Schalk v. Schmidt*, 14 N. J. Eq. 268. The rule rests upon sound principles, and should be strictly enforced. *Hoagland v. Titus*, 14 N. J. Eq. 81. Where the injunction deprives the defendant of the enjoyment of the property in dispute, and must prove greatly prejudicial to his interests, if

his claim should be established the complainant must prosecute the case with diligence. If laches or want of diligence on his part be shown, the injunction will be dissolved or security required. *Dodd v. Flavell*, 17 N. J. Eq. 255.

<sup>3</sup> *Florence Sewing Machine Co. v. Grover & Baker S. M. Co.*, 110 Mass. 2.

<sup>4</sup> *Randall v. Morrell*, 17 N. J. Eq. 348.

<sup>5</sup> *Dale v. Roosevelt*, 1 Paige, 35.

<sup>6</sup> *Lee v. Cargill*, 10 N. J. Eq. 331. See, also, *Corey v. Voorhies*, 2 N. J. Eq. 5. Where the complainant omits to have the subpoena served and returned at the term to which it is made returnable, the injunction will be dissolved. *West v. Smith*, 2 N. J. Eq. 309.

junction has been granted affecting his rights, such defendant may appear voluntarily and apply to dissolve the injunction without waiting for the service of the subpoena.<sup>1</sup> But the neglect of the complainant to serve a subpoena and injunction on some of the defendants named in the bill is not ground for dissolving the injunction as to the defendants on whom the service has been made.<sup>2</sup> And where an injunction is served upon a party without serving him also with the subpoena to appear and answer, it is too late to give notice of an application to dissolve the injunction on that ground after a subpoena has been served on him.<sup>3</sup>

**§ 779. Notice of motion to dissolve.**—A party who has obtained an injunction is entitled to notice of motion to dissolve it<sup>4</sup> a reasonable time before the motion is made.<sup>5</sup> It has been held that the notice must be personally served on the plaintiff or served at his domicile or on his attorney, and that service at the plaintiff's office was not sufficient.<sup>6</sup> In another case a notice served at the office of the plaintiff's solicitor during his absence from the city three days before the motion was held sufficient.<sup>7</sup> A general notice, where the motion is to dissolve for want of equity<sup>8</sup> or upon bill and answer, is sufficient.<sup>9</sup> But a motion to dissolve "for irregularity in the proceedings" must indicate in what particular the proceedings are irregular.<sup>10</sup>

**§ 780. Affidavits upon application to dissolve.**—The application to dissolve an injunction must be supported by evidence (which is usually given by affidavit) on the part of the

<sup>1</sup> *Waffle v. Vanderhayden*, 8 Paige, 45.

<sup>2</sup> *Seebor v. Hess*, 5 Paige, 85.

<sup>3</sup> *Seebor v. Hess*, 5 Paige, 85.

<sup>4</sup> 1 *Beach on Injunctions*, §§ 335, 336, as to notice under the New York code; *Pike v. Bates*, 84 La. Ann. 391; *Waffle v. Vanderhayden*, 8 Paige, 45; *Newton Mfg. Co. v. White*, 47 Ga. 400; *Gravais v. Falgaust*, 84 La. Ann. 92.

<sup>5</sup> *Wilkins v. Jordan*, 8 Wash. C. C. 221.

<sup>6</sup> *Marin v. Thierry*, 29 La. Ann. 362.

<sup>7</sup> *Caldwell v. Walters*, 4 Cranch C. C. 577. A notice stating the place where the motion would be made in the alternative was held void for uncertainty. *Florence v. Paschal*, 48 Ala. 458.

<sup>8</sup> *Morris Canal Co. v. Bartlett*, 8 N. J. Eq. 2.

<sup>9</sup> *Hanna v. Curtis*, 1 Barb. Ch. 208.

<sup>10</sup> *Miller v. Traphagen*, 6 N. J. Eq. 200.

defendant in answer to that upon which the injunction was obtained; and the case thus made by the defendant may be met by counter-affidavits on the part of the plaintiff.<sup>1</sup> "Where the application for dissolution was made after answer, it was originally thought that the plaintiff could not show that any of the allegations therein contained were false;<sup>2</sup> but that doctrine has been, in this country at least, exploded.<sup>3</sup> And it is well settled that the plaintiff can not only dispute the truth of such allegations, whether they are positive or negative, but is at liberty to file counter-affidavits in reply to new matter contained in the defendant's affidavits or answer."<sup>4</sup> The affidavit of a third party, annexed to an answer, cannot be read upon a motion to dissolve an injunction upon the answer, where the complainant's affidavit alone is annexed to the bill.<sup>5</sup>

§ 781. Dissolutions upon answer.—The general rule is that where all the material allegations of the bill upon which the plaintiff's equity rests are fully and explicitly denied by a sworn answer the injunction will be dissolved.<sup>6</sup> A defendant

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1676.

<sup>2</sup> 2 Daniell's Ch. Pr. (5th Am. ed.) 1676, n. 4. See, also, *Merwin v. Smith*, 2 N. J. Eq. 183; *Brown v. Winans*, 11 N. J. Eq. 267; *Tainter v. Mayor &c.*, 19 N. J. Eq. 46; *Eaton v. Jenkins*, 19 N. J. Eq. 362. Affidavits *ex parte* are not allowed to be read in support of an answer on a motion to dissolve an injunction. *Roberts v. Anderson*, 3 Johns. Ch. 202.

<sup>3</sup> *Poor v. Carleton*, 8 Sumner, 70; *United States v. Parrott*, 1 McCall, 271; *Orr v. Littlefield*, 1 W. & M. 18; *Orr v. Merrill*, 1 W. & M. 376; *Clum v. Brewer*, 2 Curt. 506.

<sup>4</sup> 1 Foster's Federal Practice (2d ed.), 239; *Fraser v. Whalley*, 2 Hem. & M. 10.

<sup>5</sup> *Mulock v. Mulock*, 26 N. J. Eq. 462.

<sup>6</sup> *Garias v. Garias*, 18 N. J. Eq. 320; *Washer v. Brown*, 5 N. J. Eq. 81; *Kaighn v. Fuller*, 14 N. J. Eq. 419; *Price v. Armstrong*, 14 N. J. Eq. 41;

*Keron v. Hirt*, 26 N. J. Eq. 26; *Delaware &c. R. Co. v. Raritan &c. Co.*, 15 N. J. Eq. 14; *Screw Mower Co. v. Mettler*, 26 N. J. Eq. 264; *Marshman v. Conklin*, 17 N. J. Eq. 282; *Hatch v. Daniels*, 5 N. J. Eq. 14; *Rockwell v. Lawrence*, 5 N. J. Eq. 20; *Furman v. Clark*, 11 N. J. Eq. 185; *Scott v. Ames*, 11 N. J. Eq. 261; *Thorp v. Pettit*, 16 N. J. Eq. 488; *Leigh v. Clark*, 11 N. J. Eq. 110; *Eaton v. Jenkins*, 19 N. J. Eq. 362; *Moies v. O'Neill*, 23 N. J. Eq. 207; *Brewer v. Day*, 23 N. J. Eq. 418; *Liebstein v. Mayor &c.*, 24 N. J. Eq. 200; *Quackenbush v. Van Riper*, 1 N. J. Eq. 476; *Masterton v. Barney*, 11 N. J. Eq. 26; *Trustees &c. v. Gilbert*, 12 N. J. Eq. 78; *Kent v. Adm'rs of De Baun*, 12 N. J. Eq. 220; *Morris Canal &c. Co. v. Fagan*, 18 N. J. Eq. 215; *Suffen v. Butler*, 18 N. J. Eq. 220; *Inhabitants &c. v. Hudson*, 21 N. J. Eq. 172; *Huron Water-works v. Huron City* (S. Dak.), 54 N. W. Rep. 652; *Grant*

may swear to his answer in order to obtain a dissolution of an injunction, although the bill waives an answer on oath.<sup>1</sup> But in some States by statute a verified answer has the effect

County v. Colonial &c. Mortg. Co. (S. Dak.), 58 N. W. Rep. 746; Miller v. Bates, 35 Ala. 580; Saunders v. Cavett, 38 Ala. 51; McClanahan v. Ware, 42 Ala. 381; Barr v. Collier, 54 Ala. 39; Dyche v. Patton, 8 Ired. (N. C.) Eq. 295; Perkins v. Hallowell, 5 Ired. (N. C.) Eq. 24; Sharpe v. King, 3 Ired. (N. C.) Eq. 403; Miller v. Washburn, 3 Ired. (N. C.) Eq. 161; Smith v. Harkins, 3 Ired. (N. C.) Eq. 618; Radcliff v. Alpress, 3 Ired. (N. C.) Eq. 556; Wright v. Grist, 1 Bush. (N. C.) Eq. 208; Moore v. Reed, 1 Ired. (N. C.) Eq. 418; Lindsey v. Etheridge, 1 Dev. & B. (N. C.) Eq. 36; Reid v. Gifford, 1 Hopk. Ch. 416; Kunz v. White Co., 8 N. Y. Supl. 505; Livingston v. Livingston, 4 Paige, 111; Minturn v. Seymour, 4 Johns. Ch. 497; Wakeman v. Gillespy, 5 Paige, 112; Gould v. Jacobsen, 18 How. Pr. 158; Finnegan v. Lee, 18 How. Pr. 186; Chesapeake &c. Canal Co. v. Baltimore &c. R. Co., 4 Gill & J. 7; Gibson v. Tilton, 1 Bland, 355; Hubbard v. Mobray, 20 Md. 165; Dorsey v. Hagerstown Bank, 17 Md. 408; Hollister v. Barkley, 9 N. H. 230, 238; Attorney-General v. Oakland Co., Walk. (Mich.) 90; Caulfield v. Curry, 63 Mich. 594; Orr v. Littlefield, 1 Wood. & M. 18; Christmas v. Campbell, 1 Hayw. 123; Thompson v. Allen, 2 Hayw. 151; Parkinson v. Trousdale, 3 Scam. 370; Alexander v. Markham, 25 Ga. 148; Douglass v. Thompson, 39 Ga. 184; Moore v. Ferrell, 1 Ga. 7; Applewhite v. Baldwin, 30 Ga. 915; Thrasher v. Partee, 37 Ga. 392; Clark v. Cleghorn, 6 Ga. 220; Hemphill v. Ruckersville Bank, 3 Ga. 435; Jones v. Joyner, 8 Ga. 563; Boring v. Rollins, 20 Ga. 628; Miller v. Maddox, 21 Ga. 327; West v. Rouse, 14 Ga. 715; Howard v. Marine Bank, 30 Ga. 841; Gravely v. Southerland, 29 Ga. 335; Weaver v. Garner, 28 Ga. 503; Edmonson v. Jones, 19 Ga. 19; Cheek v. Tilley, 81 Ind. 121; Case v. Green, 4 Ind. 526; Bradford v. Peckham, 9 R. L. 250; Magnet &c. Co. v. Page &c. Co., 9 Nev. 646; Taylor v. Dickinson, 15 Iowa, 483; Anderson v. Reed, 11 Iowa, 177; Menasha v. Milwaukee &c. R. Co., 52 Wis. 414; Burnett v. Whitesides, 13 Cal. 156; Real Del Monte &c. Co. v. Pond &c. Co., 23 Cal. 82; Yuba County v. Cloke, 79 Cal. 239; Armstrong v. Sanford, 7 Minn. 49; Pinneo v. Hefelfinger, 29 Minn. 188; Foxworth v. Magee, 48 Miss. 533; Hayzlett v. Millan, 11 West Va. 464; Rossett v. Greer, 3 West Va. 1; Blum v. Loggins, 53 Tex. 121; Linly v. Bristow, 12 Tex. 60; Hansborough v. Towns, 1 Tex. 58; Fulgham v. Chevallier, 10 Tex. 519; Machette v. Hodges, 1 Brewst. (Pa.) 313; 1 Beach on Injunctions, § 305. There should be some good reason for making an exception to the rule that an injunction will be dissolved when the answer fully denies the equity of the bill. Greenin v. Hoey, 9 N. J. Eq. 137. If an answer, though evasive in some respects, and open to exception, substantially denies the material allegations of the bill, the injunction will be dissolved. McMahon v. O'Donnell, 20 N. J. Eq. 306. Where an answer denies all the equity of the bill an injunction to stay proceedings at law will be dissolved of course. Wooden v. Wooden, 8 N. J. Eq. 429; Jones v. Sherwood, 6 N. J. Eq. 210.

<sup>1</sup> Lytton v. Steward, 2 Coop. Ch. (Tenn.) 586.



only of an affidavit, and may be opposed by counter-affidavits.<sup>1</sup>

§ 782. The same subject continued—*Requisites of answer.*—An injunction will not be dissolved on the answer unless the defendant positively denies all the equity of the bill.<sup>2</sup> An injunction will not be dissolved upon the hearing upon the bill and answer, when the answer is unsatisfactory as to any matter which is an essential part of the complainant's equity.<sup>3</sup> It is not sufficient that it denies the inference to be drawn from the facts or their effect.<sup>4</sup> An answer denying material allegations is not sufficient if the defendant has no personal knowledge of the matters denied.<sup>5</sup> A denial by the defendant upon information and belief will not avail.<sup>6</sup>

<sup>1</sup> Beach on Injunctions, § 804; *McEveroe v. Decker*, 58 How. Pr. 250; *Blackwell Tobacco Co. v. McElwee*, 94 N. C. 425; *India River Steamboat Co. v. East Coast Trans. Co.*, 38 Fla. 387, 429; *Palo Alto Banking & Co. v. Mahar*, 65 Iowa, 74; *Bradford v. Peckham*, 9 R. I. 250. Since the adoption of the amendment to United States Equity Rule 41, an answer of the defendant, where his oath is waived, can be used only with the probative force of an affidavit. *United States v. Workmen's & Co. Council*, 54 Fed. Rep. 994.

<sup>2</sup> *Scully v. Reeves*, 8 N. J. Eq. 85; *Vreeland v. New Jersey Stove Co.*, 25 N. J. Eq. 140; *Wilson v. Brown*, 12 N. J. Eq. 246; *Shotwell v. Struble*, 21 N. J. Eq. 31; *Dellett v. Kemble*, 23 N. J. Eq. 58; *Dey v. Dey*, 23 N. J. Eq. 83; *Richardson v. Peacock*, 26 N. J. Eq. 40; *Scott v. Hartman*, 26 N. J. Eq. 89; *Miller v. McDougal*, 44 Miss. 682; *Tong v. Oliver*, 1 Bland Ch. 199; *Thomas v. Horn*, 24 Ga. 481; *Brown v. Stewart*, 1 Md. Ch. 87; *Ladies' & Co. Society v. Society*, 2 Tenn. Ch. 77; *Wooten v. Smith*, 27 Ga. 216; *Jackson v. Jones*, 25 Ga. 93. A formal traverse of material matters contained in the bill is not sufficient to

dissolve an injunction. The answer must be full and satisfactory. *Brown v. Fuller*, 18 N. J. Eq. 271. An injunction will not be dissolved upon an answer only partial and equivocal. It was modified in this case to permit the debtor to make a conveyance of the property in pursuance of an existing contract. *Woodruff v. Ritter*, 26 N. J. Eq. 87. In an ordinary creditor's bill the denial of the defendant in his answer that he has any property or choses in action, or any interest in property, is not sufficient to entitle him to a dissolution of the injunction restraining him from assigning or disposing of his property. *New v. Baine*, 10 Paige, 502.

<sup>3</sup> *Gibby v. Hall*, 27 N. J. Eq. 202; *Large v. Ditmars*, 27 N. J. Eq. 288; *Kuhl v. Martin*, 26 N. J. Eq. 60; *Williams v. Hall*, 1 Bland Ch. 195.

<sup>4</sup> *Teasey v. Baker*, 19 N. J. Eq. 61. See, also, *Hughes v. Tinsley*, 80 Va. 259.

<sup>5</sup> *Williams v. Kingsley*, 5 N. J. Eq. 119.

<sup>6</sup> *Irick v. Black*, 17 N. J. Eq. 190; *Society & Co. v. Low*, 17 N. J. Eq. 20; *Pierson v. Ryerson*, 5 N. J. Eq. 196; *Holdrege v. Gwynne*, 18 N. J. Eq. 27; *Apthorpe v. Comstock*, 1 Hopk. Ch.

Nor will an injunction be dissolved upon new matter in the answer by way of justification or avoidance of the matters contained in the bill, and not responsive thereto.<sup>1</sup>

§ 783. The same subject continued — Where there are several defendants.— It is a general rule that an injunction properly granted will not be dissolved upon an answer until the answers of all the defendants are put in, provided they are all implicated in the same charge,<sup>2</sup> and the complainant has

148; *Ward v. Van Bokkelen*, 1 Paige, 41 Miss. 717; *Richardson v. Lightfoot*, 52 Miss. 508; *Judd v. Hatch*, 81 Iowa, 491; *Hayes v. Billings*, 69 Iowa, 387; *Appeal of Luburg (Pa.)*, 17 Atl. Rep. 245; *Minturn v. Seymour*, 4 Johns. Ch. 497; *Farris v. Houston*, 78 Ala. 250; *Columbus &c. R. Co. v. Witherow*, 82 Ala. 190. As to what are and are not responsive answers, see § 869 *et seq.*, *supra*.  
*Coale v. Chase*, 1 Bland Ch. 186; *Clayton v. Lyle*, 2 Jones' (N. C.) Eq. 188. An answer is not sufficient if there be an extreme improbability in the defendant's statements. *Moore v. Hylton*, 1 Dev. Eq. 439. The weight of an answer as evidence has been discussed at considerable length in a preceding part of this work, § 866 *et seq.*, *supra*.

<sup>1</sup> *Hazelhurst v. Sea Isle City Hotel Co. (N. J.)*, 25 Atl. Rep. 201; *Society &c. v. Low*, 17 N. J. Eq. 19; *Huffman v. Hummer*, 17 N. J. Eq. 268; *Armstrong v. Potts*, 23 N. J. Eq. 92; *Carson v. Coleman*, 11 N. J. 106; *Brewster v. City of Newark*, 11 N. J. Eq. 114; *West Jersey R. Co. v. Thomas*, 21 N. J. Eq. 205; *Vreeland v. New Jersey Stove Co.*, 25 N. J. Eq. 140; *Morris Canal &c. Co. v. Jersey City*, 12 N. J. Eq. 227; *Butler v. Society &c.*, 12 N. J. Eq. 269; *Green v. Pallas*, 12 N. J. Eq. 267; *Johnston v. Corey*, 25 N. J. Eq. 811; *Ettenborough v. Bishop*, 26 N. J. Eq. 263; *Randall v. Morrell*, 17 N. J. Eq. 843; *Speak v. Ransom*, 2 Tenn. Ch. 210; *Hooker v. Austin*,

41 Miss. 717; *Richardson v. Lightfoot*, 52 Miss. 508; *Judd v. Hatch*, 81 Iowa, 491; *Hayes v. Billings*, 69 Iowa, 387; *Appeal of Luburg (Pa.)*, 17 Atl. Rep. 245; *Minturn v. Seymour*, 4 Johns. Ch. 497; *Farris v. Houston*, 78 Ala. 250; *Columbus &c. R. Co. v. Witherow*, 82 Ala. 190. As to what are and are not responsive answers, see § 869 *et seq.*, *supra*.

<sup>2</sup> *Noble v. Wilson*, 1 Paige, 164; *Coleman v. Gage*, *Clarke's Ch.* 295; *Depeyster v. Graves*, 2 Johns. Ch. 148; *Stoutenburgh v. Peck*, 4 N. J. Eq. 446; *Smith v. Loomis*, 5 N. J. Eq. 60; *Price v. Clevenger*, 3 N. J. Eq. 207; *Jones v. Magill*, 1 Bland Ch. 177, 200; *Vandervoort v. Williams*, *Clarke's Ch.* 377; *Baltimore &c. R. Co. v. Wheeling*, 18 Gratt. 40; *Jewett v. Bowman*, 27 N. J. Eq. 171; *Reynolds v. Mitchell*, 1 Ill. 177. See, also, *Teller v. Van Deusen*, 3 Paige, 38. That the only defendant who has sufficient knowledge to answer allegations is out of the State is no ground of exception to the general rule. *Lines v. Spear*, 8 N. J. Eq. 154. Where the answer of the defendant who has been restrained denies the equities of the bill, and the answers of other defendants who are the parties most interested admit all the facts, the injunction will not be dissolved. *Zabriskie v. Vreeland*, 12 N. J. Eq. 179. Where, on an application to dissolve an injunction, it appeared that the defendants who had answered denied the

made use of due diligence to get in their answers.<sup>1</sup> Thus an injunction granted upon an allegation of the fraudulent concealment of a written agreement between the defendant and another defendant in an action at law will not be dissolved upon the answer of one defendant and the affidavit of the other without the answer of both and the production of such agreement.<sup>2</sup> But the qualification of the rule is that it is enough if those defendants answer upon whom the gravamen of the charge rests.<sup>3</sup> And if the answering defendant is able from his own connection with the subject-matter and consequent knowledge to lay the facts before the court which show that the complainant has no equity, the injunction will be dissolved without the answer of the other defendant.<sup>4</sup>

§ 784. The same subject continued — Exceptions to answer.— Where an answer under oath explicitly and fully denies the grounds on which an injunction has been granted, it will be dissolved, although exceptions to other parts of the

fraud charged in the bill, but other defendants more deeply interested in getting the injunction dissolved remained silent, the court would not grant the motion. The complainants were entitled to the answer of the other defendants. *Wisham v. Lipincott*, 9 N. J. Eq. 858.

<sup>1</sup> *Noble v. Wilson*, 1 Paige, 164; *Stoutenburgh v. Peck*, 4 N. J. Eq. 446; *Shonk v. Knight*, 12 West Va. 667. The want of due diligence in the plaintiff, after obtaining an injunction, in taking steps to compel all the defendants to answer, is always a cause for dissolving the injunction. *Depeyster v. Graves*, 2 Johns. Ch. 148. See, also, *Baltimore & C. R. Co. v. Wheeling*, 13 Gratt. 40; *Robinson v. Davis*, 11 N. J. Eq. 802; *Mallett v. Weybassett Bank*, 1 Barb. 217.

<sup>2</sup> *Prickett v. Tuller*, 29 N. J. Eq. 154.

<sup>3</sup> *Adams v. Hudson County Bank*, 10 N. J. Eq. 585; *Depeyster v. Graves*, 2 Johns. Ch. 148; *Stoutenburgh v. Peck*, 4 N. J. Eq. 446.

<sup>4</sup> *Gregory v. Stillwell*, 6 N. J. Eq.

51; *Fowler v. Williams*, 20 Ark. 641; *Coleman v. Gage*, Clarke's Ch. 295; *Dunlap v. Clements*, 7 Ala. 539; *Heck v. Vollmer*, 29 Md. 507; *Rogers v. Hosack*, 18 Wend. 319; *Ashe v. Hale*, 5 Ired. (N. C.) Eq. 55; *Douglass v. County of Baker*, 28 Fla. 419. There is no rule of a court of equity which requires in every case that before an injunction will be dissolved on motion every defendant must answer the bill. If the defendant who has failed to answer is a formal defendant, or if his answer would be in reference only to uncontroverted facts, the court may order the dissolution of an injunction, though such an answer has not been filed, if the defendants really interested in the subject of controversy have answered and deny on oath every material allegation in the bill and no proof is offered to sustain the allegations of the bill." *Hayzlett v. McMillan*, 11 West Va. 464; *Livesay v. Teamster*, 21 West Va. 88, 108.

answer have been filed.<sup>1</sup> The English rule that exceptions to an answer undisposed of are a bar to a dissolution upon the denials of the answer<sup>2</sup> has not been adopted in this country.<sup>3</sup> The court will hear an argument upon exceptions to the answer and upon the motion to dissolve the injunction at the same time.<sup>4</sup>

§ 785. The same subject continued — Discretion of the court.—The rule that where the answer fully denies the equity of the bill the injunction will be dissolved is not inflexible. The dissolution rests in the discretion of the court on a consideration of all the facts alleged and admitted in the answer, and the injunction will be retained until final hearing if the circumstances of the case and justice between the parties require it.<sup>5</sup> If the case presented by the bill is one that

<sup>1</sup> *Stitt v. Hilton*, 81 N. J. Eq. 285; *McGee v. Smith*, 16 N. J. Eq. 463; *Mitchell v. Mitchell*, 20 N. J. Eq. 284; *India River Steamboat Co. v. East Coast Trust Co.*, 28 Fla. 387, 432. On motion to dissolve an injunction upon the answer, exceptions filed are no objection to the motion unless they affect the answer in points relating to the grounds of the injunction. *Doe v. Roe*, *Hopk. Ch.* 273. Where exceptions to the answer of one of the defendants are submitted to, if the exceptions go to the merits an injunction will be dissolved. And the same rule holds where the exceptions are allowed by the master. *Noble v. Wilson*, 1 Paige, 164.

<sup>2</sup> *Williams v. Davis*, 1 Sim. & Stu. 262; *Howes v. Howes*, 1 Beav. 197.

<sup>3</sup> *Mitchell v. Mitchell*, 20 N. J. Eq. 284; *Wyckoff v. Cochran*, 4 N. J. Eq. 420.

<sup>4</sup> *Wyckoff v. Cochran*, 4 N. J. Eq. 420; *Bradford v. Peckham*, 9 R. I. 250; *Salmon v. Claggett*, 3 Bland Ch. 125, 131.

<sup>5</sup> *Mulock v. Mulock*, 26 N. J. Eq. 461; *Firmstone v. De Camp*, 17 N. J. Eq. 317; *Simon v. Townsend*, 27

N. J. Eq. 802; *Irick v. Black*, 17 N. J. Eq. 190, and cases there cited; *Carr v. Weld*, 18 N. J. Eq. 41; *Murray v. Elston*, 28 N. J. Eq. 127; *Camden &c. R. Co. v. Stewart*, 18 N. J. Eq. 489; *Stotesbury v. Vaill*, 18 N. J. Eq. 390; *Bank of Monroe v. Schermerhorn*, *Clarke's Ch.* 303; *Snyder v. Seeman*, 41 N. J. Eq. 405; *Hastings v. Palmer*, *Clarke's Ch.* 53; *McKibbin v. Brown*, 14 N. J. Eq. 14; *Camden &c. R. Co. v. Atlantic City &c. Co.*, 26 N. J. Eq. 69; *French v. Snell*, 29 N. J. Eq. 95. Where the answer substantially admits the equities of the bill, the injunction will be continued. *Central R. Co. v. Bunn*, 11 N. J. Eq. 337. In *Poor v. Carleton*, *Justice Story* said:—"I confess I should be sorry to find that any such practice had been established as that a special injunction should, at all events, be dissolved upon the mere denial by the answer of the whole merits of the bill. There are many cases in which such a practice would be most mischievous, nay, might be the cause of irreparable mischief. The true rule seems to me to be that the question of the dissolution of a special

seems to require investigation, and a dissolution of the injunction would enable the defendant to place the property which is the subject of the controversy beyond the control of the court, and would be tantamount to a denial of the relief sought, the injunction will not be dissolved.<sup>1</sup> Where an injunction bill prays relief against a suit at law as well as discovery, and in regard to a subject-matter which appropriately belongs to equity jurisdiction, the court will retain the injunction, although the equity of the bill is fully answered and the discovery prayed for obtained.<sup>2</sup> It is not necessary to the continuance of an injunction that it should be clear that the complainant will succeed at the hearing. It is sufficient if there is ground for supposing that relief may be given.<sup>3</sup> Where the effect of the dissolution of an injunction will be to permit the defendants to proceed at law to enforce their claim against a fund in controversy, and to compel the holders of the fund, in order to protect themselves against loss from conflicting claims, to seek the aid of the court of chancery, the injunction will be retained.<sup>4</sup> Unless in cases entirely free from doubt, the appellate court will not interfere with the order of the chancellor continuing an injunction until the final hearing.<sup>5</sup>

**§ 786. Considerations influencing discretion to dissolve.—**

The court may dissolve an injunction on its own motion, where it appears that the writ has been issued in a case where

injunction is one which, after the answer comes in, is addressed to the sound discretion of the court."

<sup>1</sup> *Hoagland v. Titus*, 14 N. J. Eq. 81. And when the complainant is in danger of losing his remedy if the injunction be dissolved or the answer, though technically denying the equity of the bill, is not wholly ingenuous, the court will retain the injunction. *Fleischman v. Young*, 9 N. J. Eq. 620.

<sup>2</sup> *Brown v. Edsall*, 9 N. J. Eq. 256. Where an injunction bill restraining an action at law is retained for final relief in equity, and nothing can be gained by permitting the party to

proceed with his action at law, the injunction will be continued. *Mulford v. Bowen*, 9 N. J. Eq. 797. That a dissolution of an injunction to stay a suit at law would leave the complainant remediless affords no sufficient reason for holding the injunction till the hearing, when the want of remedy consists in the want of a valid defense to the suit. *Keron v. Hirt*, 26 N. J. Eq. 26.

<sup>3</sup> *Huffman v. Hummer*, 17 N. J. Eq. 263, and cases cited.

<sup>4</sup> *Mosser v. Pequest Mining Co.*, 26 N. J. Eq. 200.

<sup>5</sup> *Mayor of Jersey City v. Morrin Canal &c. Co.*, 12 N. J. Eq. 545.

the party asking it had no right to it.<sup>1</sup> An injunction ought not to be continued where the statements of the bill to sustain it are improbable.<sup>2</sup> A motion to dissolve was denied where the right to the injunction depended upon new and important questions of law awaiting adjudication in another tribunal.<sup>3</sup> An objection for misjoinder which would sustain a demurrer constitutes no ground for dissolving the injunction if one has been granted. The bill may be amended after injunction granted without prejudice to the injunction.<sup>4</sup> The court has power to construe a written instrument upon a motion to dissolve, but it may, in its discretion, defer the construction till the final hearing.<sup>5</sup> Upon a motion to dissolve an injunction the court will not undertake to determine points of doubt or difficulty upon which the merits of the case may depend, but will leave them to be determined at the final hearing, when the evidence is fully before the court.<sup>6</sup> Unless the necessity is so urgent as to require immediate action, an injunction will not be modified, changed, or set aside, except by the same judge who granted it.<sup>7</sup>

**§ 787. Perpetual injunctions.**—Perpetual injunctions are such as form part of the decree made at the hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience.<sup>8</sup> An injunction can only be made perpetual at the hearing of the cause; and when made perpetual it continues in force notwithstanding some of the parties to the suit marry or die.<sup>9</sup> To support a decree for a perpetual in-

<sup>1</sup> *Conover v. Ruckman*, 82 N. J. Eq. 685. Although the equity of the bill is not answered, the court may, in its discretion, dissolve the injunction when its retention is an injury to the defendant and of no benefit to the complainant. *Betchel v. Carslake*, 11 N. J. Eq. 244.

<sup>2</sup> *Fowler v. Roe*, 11 N. J. Eq. 367.

<sup>3</sup> *Morris & Essex R. Co. v. Haskins*, 26 N. J. Eq. 295. See *Reeves v. Cooper*, 12 N. J. Eq. 223.

<sup>4</sup> *Johnson v. Vaill*, 14 N. J. Eq. 424.

<sup>5</sup> *Morris Canal &c. Co. v. Matthiesen*, 17 N. J. Eq. 385.

<sup>6</sup> *Huffman v. Hummer*, 17 N. J. Eq. 263.

<sup>7</sup> *Klein v. Fleetford*, 35 Fed. Rep. 98; *Cole Silver Min. Co. v. Virginia &c. Water Co.*, 1 Sawy. 685; *Preston v. Walsh*, 10 Fed. Rep. 315; *Reynolds v. Iron Silver Min. Co.*, 33 Fed. Rep. 354.

<sup>8</sup> 1 *Barbour's Ch. Pr.* (2d ed.) 613; *Gilbert's Forum Romanum*, 194, 195.

<sup>9</sup> *Gibson's Suits in Chancery*, § 817;

junction there must be nothing like a doubt in the case.<sup>1</sup> The complainant may have a decree for a perpetual injunction although he may not have made any application for an interlocutory injunction,<sup>2</sup> and although such application was denied.<sup>3</sup> A perpetual injunction which is decreed without notice to defendant and without an opportunity to him to be heard is invalid;<sup>4</sup> but a decree awarding a perpetual injunction cannot be reversed merely because a preliminary injunction was granted in the suit without notice to defendant, if the evidence justifies such a decree.<sup>5</sup> A perpetual injunction may be allowed or refused upon terms.<sup>6</sup>

*Justice v. McBroom*, 1 Lea, 555; 2 <sup>4</sup>*State v. Jacksonville &c. R. Co.*,  
*Daniell's Ch. Pr.* (5th ed.) 1680-1688; 15 Fla. 201; 1 *Beach on Injunctions*,  
*Askew v. Townsend*, 2 Dick. 471. § 127.

<sup>1</sup> *Whittingham v. Wooler*, 2 <sup>5</sup>*Brown v. Luches*, 79 Ill. 575.

*Swanst.* 428, n. See, also, *Baily v.* <sup>6</sup>1 *Foster's Federal Practice* (2d  
*Taylor*, 1 Russ. & Myl. 73. ed.), § 238; *Southern Express Co. v.*

<sup>2</sup>*Bacon v. Spottiswoode*, 1 Beav. *St. Louis &c. Ry. Co.*, 10 Fed. Rep.  
 888; *Bacon v. Jones*, 4 Myl. & Cr. 210; s. c., 10 Fed. Rep. 869; *Mo-*  
 488. *Crary v. Penn. Coal Co.*, 5 Fed. Rep.

<sup>3</sup>*Baily v. Taylor*, 1 Russ. & Myl. 76. 867; *Brown v. Deere*, 6 Fed. Rep. 487.

## CHAPTER XXIV.

### DECREES AND PROCEEDINGS THEREUNDER.

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| <p>§ 788. Definition of decrees.</p> <p>789. Decrees interlocutory or final.</p> <p>790. Decree founded on pleadings and evidence.</p> <p>791. Time of entering decree.</p> <p>792. Consent decrees.</p> <p>793. Consent decrees in case of infants.</p> <p>794. Effect of consent decrees.</p> <p>795. The same subject continued.</p> <p>796. <i>Nunc pro tunc</i> decrees.</p> <p>797. <i>Nunc pro tunc</i> decrees after the death of a party.</p> <p>798. The same subject continued.</p> <p>799. Decrees against infants.</p> <p>800. Decree between co-defendants.</p> <p>801. Decree ordering payment of money to persons not parties.</p> <p>802. Decree establishing a will of real estate.</p> <p>803. Decrees requiring conveyance of land.</p> <p>804. Decrees reforming instruments.</p> <p>805. Frame of decrees.</p> <p>806. Recitals and findings of facts.</p> <p>807. The same subject continued — Federal court rules.</p> <p>808. The same subject continued — Connecticut, Indiana and Illinois.</p> <p>809. The same subject continued — Utah.</p> | <p>§ 810. Construction of decrees.</p> <p>811. Foreclosure decrees.</p> <p>812. Interlocutory decree for a sale.</p> <p>813. Deficiency decree in foreclosure suits.</p> <p>814. Sale must be authorized by decree.</p> <p>815. Rules regulating decrees for sale.</p> <p>816. Proceedings under decrees for sale generally.</p> <p>817. The same subject continued — Subsequent adjustment of priorities.</p> <p>818. Foreclosure sales, by whom conducted.</p> <p>819. Conduct of sale.</p> <p>820. Authority to set aside sale.</p> <p>821. The same subject continued — Grounds for setting aside.</p> <p>822. The same subject continued — Application and parties.</p> <p>823. Form of remedy to set aside sales.</p> <p>824. Resale.</p> <p>825. The same subject continued.</p> <p>826. Enforcing sale against purchaser.</p> <p>827. The same subject continued.</p> <p>828. Enforcing liability of purchaser for deficiency on resale.</p> <p>829. Title of the purchaser.</p> <p>830. The same subject continued.</p> |
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§ 788. Definition of decrees.— A decree is a sentence or order of the court, corresponding to the judgment of a court of law, pronounced after the hearing or submission of the cause.<sup>1</sup>

<sup>1</sup> 1 Barbour's Ch. Pr. (2d ed.) 336.



A decree is distinguished from a decretal order in that the former is made upon the hearing, and the latter is made upon motion or petition either before or after the hearing.<sup>1</sup> Until reversed by an appellate court or impeached by an original bill for fraud, or set aside by a bill of review, a decree, however erroneous, is absolutely conclusive upon the parties to the suit and their privies, provided the court had jurisdiction of the subject-matter and of the parties.<sup>2</sup>

§ 789. **Decrees interlocutory or final.**—Decrees and orders in equity proceedings are subject to only one general division, and are classed either as final or interlocutory decrees or orders.<sup>3</sup> An interlocutory decree has been repeatedly defined as any decree made before final decision, and for the purpose of ascertaining matter of law or fact preparatory to a final decree.<sup>4</sup> In the English court of chancery a final decree was a complete determination of every question arising in a cause.<sup>5</sup> The cases in which the courts are compelled to determine whether decrees are interlocutory or final are chiefly appeals under statutes providing for appeals from final decrees only, and numerous decisions upon the subject will be found in another part of this work.<sup>6</sup> In Massachusetts a final decree for the purpose of appeal has been defined as one "which provides for all contingencies which may arise, and leaves no necessity for any further order of the court to give all the parties the entire benefit of decision."<sup>7</sup> In the federal courts a decree which determines the whole controversy between the parties, leaving nothing to be done except

<sup>1</sup> 1 Barbour's Ch. Pr. (2d ed.) 337.

<sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 986, note; Gibson's Suits in Chancery, § 546. A decree rendered by a divided court is as conclusive and binding in every respect as if it had the concurrence of all the judges. *Durant v. Essex Co.*, 7 Wall. 107.

<sup>3</sup> *Richmond v. Atwood* (C. C. A.), 52 Fed. Rep. 10, 20, 21, citing numerous authorities.

<sup>4</sup> *Richmond v. Atwood*, 52 Fed. Rep. 10, 19; Barbour's Ch. Pr. 326; *Seton on Decrees*, 1; *Beebe v. Rus-*

*sell*, 19 How. 263, 265; *Brush Electric Light Co. v. Electric Imp. Co.*, 51 Fed. Rep. 557.

<sup>5</sup> 1 Barbour's Ch. Pr. (2d ed.) 337.

<sup>6</sup> See Chapter XXVIII, *infra*, on APPEALS AND APPELLATE PROCEDURE.

<sup>7</sup> *Gerrish v. Black*, 109 Mass. 474, 477. No decree is a final one which leaves anything open to be decided by the court and does not determine the whole case. *Forbes v. Tuckerman*, 115 Mass. 115, 119.

to carry it into execution, is a final decree for the purpose of appeal, and none the less so that the court retains the fund in controversy for the purpose of distributing it as decreed.<sup>1</sup>

**§ 790. Decree founded on pleadings and evidence.**—A court of equity will only decree on the case made by the pleadings, though the evidence may show a right to a further decree.<sup>2</sup> A decree or judgment adjudicating a matter outside of the issue raised by the pleadings is an absolute nullity and open to collateral attack.<sup>3</sup> A decree based on pleadings without proof, though subject to reversal on appeal, will be good against collateral attack.<sup>4</sup> It is not a sufficient variance between a decree and a bill in a foreclosure suit, to render the decree erroneous, that the bill alleges that the bonds were to be paid in gold coin, and the decree is for payment in lawful money, where it appeared that the bonds were actually payable in lawful money.<sup>5</sup> A decree is not erroneous as being for a greater sum than is claimed by the bill, when the bill

<sup>1</sup> *Lewisburg Bank v. Sheffy*, 140 U. S. 445. A decree purporting to be final may be superseded by a subsequent decree at the same term, without stating in what particular the latter was intended to modify or supplement the former. *Barrell v. Tilton*, 119 U. S. 637.

<sup>2</sup> *Kent's Adm'r v. Kent's Adm'r*, 82 Va. 205. See, also, § 99, *supra*. A decree establishing a resulting trust can only be made upon either an original or cross-bill. *Beck v. Beck*, 48 N. J. Eq. 40.

<sup>3</sup> *Jones v. Davenport*, 45 N. J. Eq. 77; *Reynolds v. Stockton*, 48 N. J. Eq. 211; *Gibson's Suits in Chancery*, § 539; *Elliott v. Pell*, 1 Paige, 263; *Tripp v. Vincent*, 8 Barb. Ch. 613. See *Goodhue v. Churchman*, 1 Barb. Ch. 596.

<sup>4</sup> *Gibson's Suits in Chancery*, § 539.

<sup>5</sup> *Wallace v. Loomis*, 97 U. S. 146. In an action for foreclosure of a mortgage by an assignee, an omission to allege in the complaint an as-

signment of the bond, as well as of the mortgage, does not invalidate a judgment of foreclosure, where the assignment of both bond and mortgage is on record, and the referee's report of the amount due refers to such record. *Preston v. Loughran*, 12 N. Y. Supl. 813. A complaint in an action for the enforcement of a contract alleged that plaintiff and defendant entered into a contract whereby defendant agreed to obtain certain patents, and plaintiff agreed to advance all money necessary therefor and for making the same available for use or sale, such advances to be repaid from the use or sale of the patent and the patented machines, all other money arising therefrom to be equally divided between the parties. It was held that these allegations were broad enough to justify a decree for a sale of the whole patent, and not merely enough of it to pay plaintiff's advances. *Vail v. Hammond*, 60 Conn. 374.

seeks to recover a certain sum, with interest from a given time, and the decree is for a sum less than such amount, with interest from the time specified until decree.<sup>1</sup> In an action to foreclose a mortgage given to plaintiff as "trustee of the estate of W.," a decree in favor of plaintiff as "trustee of the estate of W., deceased," is supported by pleadings that plaintiff sued as "trustee for the heirs at law of W."<sup>2</sup> It was held in an action by creditors to set aside a fraudulent conveyance, and asking judgment for the amount of their claims, that the court had power to assess damages in favor of creditors whose claims were not set forth in the complaint, but who were named in the title thereof.<sup>3</sup>

§ 791. Time of entering decree.— When the cause has been regularly brought to a hearing and time taken to consider, the decree may be entered at any time thereafter in term time or in vacation, in the chancellor's discretion, whenever he is ready to pronounce it.<sup>4</sup> But after having held a case and rendered a decision, he has no further power over it. It stands then like any other case that had been decided during the term.<sup>5</sup>

<sup>1</sup> *Maxwell v. Smith*, 2 Pickle (Tenn.), 539; s. c., 8 S. W. Rep. 340.

<sup>2</sup> *White v. Allatt*, 87 Cal. 245; s. c., 25 Pac. Rep. 420.

<sup>3</sup> *Doherty v. Holiday* (Ind.), 32 N. E. Rep. 315.

<sup>4</sup> *Rose v. Woodruff*, 4 Johns. Ch. 547, per Chancellor Kent. See *Griswold v. Hill*, 1 Paine, 483; *Thompson v. Goulding*, 5 Allen, 81. A decree is never pronounced in any case (except where the cause has been submitted out of court by consent of parties) unless the cause has been regularly set down for hearing in term. *Rose v. Woodruff*, *supra*.

<sup>5</sup> *Sturdevant v. Stanton*, 47 Conn. 579. In the same case it was held that where a cause has been heard and retained for decision after the close of the term, it remains upon the docket of the court, and is thus

in a sense under the control of any judge holding a later term of the court while it remains on the docket; and if the judge who heard the case for any cause fails to decide it, the court may in its discretion resume control of it, and hear it and render judgment in it as if it had never been heard before. Where a decision is rendered in vacation by a court of equity at the place where the judge resides, and just before the expiration of his term of office, and is then delivered to an express company for transmission to the clerk of court, the fact that it does not reach the clerk until after the expiration of the said term does not render it invalid. *Shenandoah Nat. Bank v. Read* (Iowa), 53 N. W. Rep. 96, following *Babcock v. Wolf*, 70 Iowa, 676.

§ 792. **Consent decrees.**— Parties to a suit have the right to agree to anything they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings.<sup>1</sup> An agreement to refer the pending suit to an arbitrator, and that a judgment in the cause should be entered according to his decision, will justify the entry of such judgment; and it will be binding upon the parties as a judgment entered by consent.<sup>2</sup> A consent decree is not void as between the parties because another should have been made a party, or because it does not precisely follow the petition or accord with the facts, or because it embraces matters which should not have been joined, or because infant parties were not properly represented.<sup>3</sup>

§ 793. **Consent decrees in case of infants.**— Where infants are concerned the court does not usually make a decree by consent without first inquiring whether it will be for their benefit; yet if such a decree is made, the infants will be bound by it.<sup>4</sup> A partition decree entered by consent in a suit in which there are infant defendants, although erroneous on

<sup>1</sup> *Pacific R. Co. v. Ketchum*, 101 U. S. 289, holding that it is within the power of parties to a suit to agree that a decree may be entered for the sale of mortgaged property, without any specific finding of the amount due, or without giving a day of payment. The remedy of a party injured by his counsel's consent is against his counsel. 2 *Daniell's Ch. Pr.* (5th ed.) 974; *Gibson's Suits in Chancery*, § 558. "If it does not so show upon its face it is not a consent decree, even though in fact it was consented to; but it is the decree of the court *in invitum*, and subject to all the remedies for its correction allowable in case of contested decrees." *Gibson's Suits in Chancery*, § 558. See, also *Hershee v. Hershey*, 15 Iowa, 185. A decree cannot be regarded as a consent decree because

it is indorsed by counsel, "*Submitted to us.*" *Gibson v. Burgess*, 82 Va. 650. A recital in the record of a decree that the cause came on "for final hearing upon the stipulation of the parties" is not sufficient to show that the decree was rendered by consent. *American Emigrant Co. v. Fuller* (Iowa), 50 N. W. Rep. 48. A decree recited to be by consent of "defendants' solicitors" will be presumed to have been consented to only by those defendants who have appeared in the suit. *Clyburn v. Reynolds*, 81 S. C. 91; a. c., 9 S. E. Rep. 978.

<sup>2</sup> *Bank of Monroe v. Widner*, 11 Paige, 529.

<sup>3</sup> *Schermerhorn v. Mahaffie*, 84 Kan. 108.

<sup>4</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 979; *Gibson's Suits in Chancery*, § 558;

its face, will not be set aside at the suit of the infants after the land has been sold to a *bona fide* purchaser who was not a party to the suit.<sup>1</sup>

**§ 794. Effect of consent decrees.**—A decree for a sale, made with the approbation of counsel filed in court, removes all preceding technical objections.<sup>2</sup> A decree by consent of parties, and upon a compromise between them, setting forth the terms thereof, is a bar to a subsequent suit upon a claim settled by it, although not in fact litigated in the suit in which the decree was rendered.<sup>3</sup> A decree for an account, entered by consent in a suit for infringement of a patent, does not preclude the defendant from objecting to the master's report, which goes beyond the particular account prayed for in the bill.<sup>4</sup>

**§ 795. The same subject continued.**—A decree or judgment by consent is binding and conclusive unless procured by fraud.<sup>5</sup> It is not the subject of an appeal or rehearing<sup>6</sup> or bill of review,<sup>7</sup> and cannot be modified or varied in an essential part without the assent of both parties to the same;<sup>8</sup> and even then only at the same term at which it was rendered.<sup>9</sup> Although an order or decree has been entered by consent, the court upon the application of either party may give such further directions as shall become necessary for the purpose of carrying such order or decree into effect according to its spirit

Wall v. Bushby, 1 Bro. C. C. 484; consent. Finley v. Bank of U. S., 11 Musgrove v. Lusk, 2 Tenn. Ch. 576. Wheat, 304.

<sup>1</sup> Allison v. Drake (Ill.), 32 N. E. Rep. 587.

<sup>2</sup> Kennedy v. Bank of Georgia, 8 How. 586.

<sup>3</sup> Nashville &c. Ry. Co. v. United States, 118 U. S. 261.

<sup>4</sup> Livingston v. Woodworth, 15 How. 546. See, also, Gibson's Suits in Chancery, § 558.

<sup>5</sup> French v. Shotwell, 5 Johns. Ch. 555. It would require an extreme case to warrant opening a decree made by consent after it has been carried into execution on the petition of the party who has given the

<sup>6</sup> Atkinson v. Manka, 1 Cowen, 698; Stewart v. Forbes, 1 Macn. & G. 137; Armstrong v. Cooper, 11 Ill. 540.

<sup>7</sup> Webb v. Webb, 3 Swanst. 658.

<sup>8</sup> Leitch v. Cumpston, 4 Paige, 476.

<sup>9</sup> Morris v. Peyton, 29 West Va. 201, where the effect of consent decrees is discussed at length. In order that a consent decree may be set aside for mistake it must appear that there was a common intention and understanding which failed to find expression in the decree. Kerchner v. McEachern, 98 N. C. 447.

and intent.<sup>1</sup> A consent decree may be set aside for fraud upon original bill,<sup>2</sup> or by application in the cause at the same term the decree was rendered.<sup>3</sup>

§ 796. *Nunc pro tunc* decrees.— When the delay of the chancellor in deciding the cause after the hearing, or the delay of counsel, or the clerk, in drawing or entering the decree after the decision, works an injury to any party, and especially to the winning party, the court will, on the application of the party interested, order the decree to bear even date with the hearing, or with the decision, as the party in interest may elect. Such a decree is said to be entered *nunc pro tunc*.<sup>4</sup> A *nunc pro tunc* order or decree may be entered in vacation as of a previous term,<sup>5</sup> or even after an appeal has been prayed and granted;<sup>6</sup> but not after the jurisdiction of the court over the cause is lost.<sup>7</sup> A decree made by a chancellor was signed

<sup>1</sup> Leitch v. Cumpston, 4 Paige, 476.

<sup>2</sup> Bradish v. Gee, Amb. 229; Dav-  
enport v. Stoddard, 8 Beav. 503, 523.

<sup>3</sup> Doss v. Tyack, 14 How. 297; Sa-  
leski v. Boyd, 32 Ark. 74.

<sup>4</sup> Gibson's Suits in Chancery, § 559; Freeman on Judgments, §§ 56-58; Gray v. Brignardello, 1 Wall. 627; Foster v. Woodfin, 65 N. C. 29. See, also, United States v. Gomez, 1 Wall. 690; Supervisors v. Durant, 9 Wall. 736. It may be made on application of a third person. Storey v. Saunders, 1 Hayes & J. 341. But see Witby v. Norton, 4 Y. & C. 266. Where a *nunc pro tunc* decree is entered on parol evidence notice should be given. Freeman on Judgments (3d ed.), § 64. The power of the chancellor to order a decree to be signed *nunc pro tunc*, even after a very long interval has elapsed since pronouncing it, is beyond question. Ruckman v. Decker, 27 N. J. Eq. 244, 245. Twenty-three years had elapsed in Lawrence v. Richmond, 1 J. & W. 241. And seventy-nine years in Jesson v. Brewer, 1 Dick. 870. And nine years in Russell v. Tapping,

8 W. R. 376. See *Ex parte* Dean &c., 18 W. R. 724. See, also, Drummond v. Enderson, 3 Grant's Ch. (Up. Can.) 152. A *nunc pro tunc* order or decree to supply an omission by the clerk to enter a decree actually announced, or *nunc pro tunc* decree made at a subsequent term, should be based on clear record evidence. Hudson v. Hudson, 20 Ala. 364; Metcalf v. Metcalf, 19 Ala. 819; Perkins v. Perkins, 27 Ala. 479; McGavock v. Puryear, 6 Cold. (Tenn.) 34; Farris v. Kilpatrick, 1 Humph. (Tenn.) 379; Gibson's Suits in Chancery, § 559; Groch v. Stenger, 65 Ill. 481; Hughes v. Washington, 65 Ill. 245. Intervening rights of third parties are not affected. Dawson v. Scriven, 1 Hill's Ch. 177.

<sup>5</sup> Gray v. Brignardello, 1 Wall. 627; Griswold v. Hill, 1 Paine, 488.

<sup>6</sup> Gibson's Suits in Chancery, § 559, citing Davis v. Jones, 3 Head, 608; Pond v. Trigg, 5 Heisk. 536; Newland v. Gaines, 1 Heisk. 720.

<sup>7</sup> Gibson's Suits in Chancery, § 559, citing Stoggs v. State, 3 Humph. (Tenn.) 372; Hill v. Bowers, 4 Heisk.

by his successor, and on motion to take it from the files an order was made directing it to be filed *nunc pro tunc*.<sup>1</sup> The caption of a decree or order, unless otherwise directed by the court, should correspond with the time of the actual entry of such decree or order. And where a decree is entered *nunc pro tunc* as of a previous date, or otherwise, it should appear by some entry in the minutes of the decrees, or in the minutes of the proceedings in the cause, or in both, at what time the decree or order was actually entered.<sup>2</sup> The usual formula in case of *nunc pro tunc* decrees is:—"This decree was made on the (naming the day the cause was heard), and is entered now for then by order of the court."<sup>3</sup>

**§ 797. Nunc pro tunc decrees after the death of a party.**

When a party dies after his case is finally submitted for decision, the court has the power to enter a decree as of the term when, in the life-time of the party, the cause, after argument, was finally submitted for decision.<sup>4</sup> The *cestui que trust* of the complainant having died after argument and before decision of the cause by which the suit was determined, the court ordered the decree to be entered *nunc pro tunc* as of the time of the argument.<sup>5</sup>

**§ 798. The same subject continued.**—It has been held that a decree *nunc pro tunc* will not be entered after the death of a defendant, where any further inquiry into matters of fact is necessary, although the bill was taken *pro confesso*.<sup>6</sup>

272. See, however, 2 Daniell's Ch. Pr. (5th ed.) 1017.

<sup>1</sup> Ruckman v. Decker, 27 N. J. Eq. 244.

<sup>2</sup> Barclay v. Brown, 7 Paige, 245.

<sup>3</sup> Gibson's Suits in Chancery, § 559.

<sup>4</sup> Mitchell v. Overman, 108 U. S. 62; Benson v. Wolverton, 16 N. J. Eq. 110, and cases there cited; Campbell v. Mesier, 4 Johns. Ch. 334. See, also, Wood v. Keyes, 6 Paige, 478; Emory v. Parrott, 107 Mass. 95, criticised in the note to the following section. An order for that purpose is necessary. Burnham v. Dall-

ing, 16 N. J. Eq. 310. "A judgment rendered after a defendant's death without the plaintiff's fault is not void. The irregularity or error may be cured by entering it *nunc pro tunc* of a date prior to the defendant's death; and even this has been held not necessary in a collateral proceeding." New Orleans v. Gaines' Adm'r, 138 U. S. 612.

<sup>5</sup> Wood v. Keyes, 6 Paige, 478.

<sup>6</sup> Hazard v. Durant, 14 R. I. 25, where the complainants relied especially upon Emory v. Parrott, 107 Mass. 95, but in respect of which the

§ 799. Decrees against infants.—There can be no valid decree binding the interests of an infant defendant without proof,<sup>1</sup> although his co-defendant and the complainant agree as to the facts.<sup>2</sup> According to the old and settled rule of prac-

court said:—"That was a suit in equity against two defendants adjudged by the court to be partners in the matter in litigation. One of them died 'after the cause was fully heard and an interlocutory decree made upon the merits and the case referred to a master to state the account;' and the other defendant, his 'surviving partner, having been fully heard before the master and before the court on exceptions to his report,' the court held that a final decree for the plaintiffs should be entered *nunc pro tunc* as of the date of the interlocutory decree. The decision goes further than any other decision with which we are acquainted, and is not supported by the cases cited as authority for it. The cases cited as authority are *Campbell v. Mesier*, 4 Johns. Ch. 334, 342; *Bank of U. S. v. Weisiger*, 2 Pet. 331, 481. The case of *Campbell v. Mesier* was the ordinary case of a judgment *nunc pro tunc* where the party dies after the case has been submitted on argument or hearing and before judgment. And so far as we can discover the other case was the same. In *Emory v. Parrott* [*supra*] the court evidently reconciled itself to going so far as it did by the consideration that though one of the defendants was dead he was represented in the subsequent proceedings before the master and the court by the other defendant, who was his surviving partner. Here we are asked not only to go further than the court went there, but to do so without the justification which the court there had; for here, Ames and Duff both

being dead, any further proceedings against them would necessarily be entirely *ex parte*. Our inquiry in regard to the practice of entering judgments *nunc pro tunc* has led us to think that such a judgment on account of death is proper only where a party dies after hearing while the case is under advisement, or after the cause has proceeded so far that judgment can be entered, if not as a mere formal act, at least without the need of further inquiry on evidence into matters of fact involved in the controversy." Citing *Freeman on Judgments*, §§ 56-63; *Turner v. London &c. Ry. Co.*, L. R. 17 Eq. 561. See, also, *Wilks v. Perks*, 5 M. & Gr. 376.  
<sup>1</sup> *Hamilton v. Gilman*, 12 Ill. 260; *Wiley v. Morris*, 39 N. J. Eq. 98; *Mills v. Dennis*, 3 Johns. Ch. 367; § 197, *supra*.

<sup>2</sup> *Wiley v. Morris*, 39 N. J. Eq. 98. A decree of foreclosure cannot be rendered against the minor heirs of a deceased mortgagor without proof of the allegations of the complaint. *Johnson v. Trotter* (Ark.), 15 S. W. Rep. 1025, citing *Pinchback v. Graves*, 42 Ark. 222; *Driver v. Evans*, 47 Ark. 297. Where a statute regulating the practice in chancery provides that each party shall set down the allegations made by him and denied by the other party, a recital in the decree that "by agreement of the parties it is consented that the bill be taken in lieu of allegations" does not imply that the decree was void as against infant defendants because based upon admissions. *Bryan v. Kennett*, 113 U. S. 179.



tice in chancery in case of a decree of foreclosure or partition against an infant, or where the real estate of an infant was to be sold or conveyed under a decree of the court, a provision was inserted in the decree giving the infant a day to show cause against it, within a certain time, usually six months, after he came of age.<sup>1</sup> The rule does not apply to infant trustees, though the trust result by implication of law.<sup>2</sup> Where an infant defendant in a bill for specific performance is decreed to convey property in another State, the proper decree is that he convey the legal title to the premises when he arrives at the proper age, according to the laws of the State where the property is situated; and that in the meantime the vendee be permitted to receive and retain the possession of the property.<sup>3</sup>

§ 800. Decree between co-defendants.—It is the policy and duty of the court to settle all claims between the parties in one suit if possible; and upon a question arising between two co-defendants, where the matter is distinctly before the court upon the pleadings and proof between the complainant and defendants in the case, the court will decide the rights of the defendants as between themselves.<sup>4</sup> The court may make

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 165; Barbour's Ch. Pr. (3d ed.) 834; Richmond v. Tayleur, 1 P. Wms. 787; Coffin v. Heath, 6 Met. 76; Beeler v. Bullitt, 4 Bibb, 11. If the infant shows no cause within the specified time the decree is made absolute against him. 2 Daniell's Ch. Pr. (5th ed.) 997, n. 1, and cases there cited. A decree against infants setting aside a conveyance made in trust for them, without giving them a day to show cause after they become of age, is erroneous, and the infants on an original bill may be relieved against such decree. Wright v. Miller (1843), 1 Sandf. Ch. 108. Where, in a decree against an infant defendant, permission is given to him to show cause against the decree within six months after he becomes of age, he cannot at that period assail the decree in any mode he may choose. He must ap-

ply to the court for its leave and direction as to the manner and the terms of showing cause. Field v. Williamson, 4 Sandf. Ch. 613.

<sup>2</sup> Walsh v. Walsh, 116 Mass. 377.

<sup>3</sup> Sutphen v. Fowler, 9 Paige, 280.

<sup>4</sup> Shannon v. Marselis, 1 N. J. Eq. 413; Jones v. Grant, 10 Paige, 848; Symmes v. Strong, 28 N. J. Eq. 181; McKay v. McKay, 83 West Va. 724, 735; Rosta v. Salt Co., 27 West Va. 488; Burlaw v. Quarrier, 16 West Va. 108. See § 480, *supra*; Corcoran v. Chesapeake &c. Canal Co., 94 U. S. 741. In a suit to foreclose a mortgage, where there are several defendants, the court need not adjudicate the opposing rights of defendants unless such questions are distinctly raised by their answers. Heath v. Blake, 28 S. C. 406; a. c., 5 S. E. Rep. 842.

a decree between defendants for contribution, or a decree over in favor of one defendant against another founded upon facts stated in the complainant's bill, and which are admitted by the defendant who is sought to be charged, either by his suffering the bill to be taken as confessed against him, or by a direct admission of such facts in his answer.<sup>1</sup> But no positive relief in adjusting equities between defendants can be decreed or granted to one defendant against another, except such as can be granted incidentally to the relief sought by the complainants.<sup>2</sup>

**§ 801. Decree ordering payment of money to persons not parties.**—Where defendant agrees to convey to plaintiff certain land, free of incumbrances, upon payment of the price, and upon tender of such price refuses to execute a conveyance, the court, in an action for specific performance, upon ascertaining the amount of such incumbrances, and that they can be discharged by mere payment thereof, may order defendant to execute a conveyance to plaintiff, may cause the purchase-money to be brought into court, and may direct its payment to the holders of the incumbrances, instead of to defendant, even though such holders are not before the court; it appearing that the incumbrances cover the whole amount of the purchase-money.<sup>3</sup>

**§ 802. Decree establishing a will of real estate.**—On a bill filed to establish a will devising real estate the court may grant relief either by making an injunction perpetual, restraining the defendants from prosecuting any suit to disturb the complainants in the possession of their respective tracts, or

<sup>1</sup> *Jones v. Grant*, 10 Paige, 848. It seems that relief will be granted as between co-defendants, on the foot of the trial decree, upon motion or petition, founded upon matters stated in the complainant's bill, and which are not in dispute between such defendants, without resorting to a supplemental bill in the nature of a cross-bill against the defendant sought to be charged. *Jones v. Grant*, *supra*.

<sup>2</sup> *Mount v. Potts*, 28 N. J. Eq. 188; *Radcliff v. Carrothers*, 88 West. Va. 682; *Hansford v. Coal Co.*, 22 West Va. 70; *Hubbard v. Goodwin*, 3 Leigh, 522; *McKay v. McKay*, 88 West. Va. 724, 785; *Jones v. Grant*, 10 Paige, 848. See § 480, *supra*.

<sup>3</sup> *Grant v. Beronio* (Cal.), 83 Pac. Rep. 556. It was held in *Rice, Friedman & Maxwell Co. v. Goldberg*, 26 Ill. App. 608, that a decree cannot award a sum of money to persons not parties to the suit.

by directing a release on the part of the defendants of all their right in said lands to be made to the complainants, or by a decree establishing the will in all its parts. The last course should be adopted wherever the contents of the will can be ascertained.<sup>1</sup>

§ 803. Decrees requiring conveyance of land.—It seems to be settled that the courts of one State or country are without jurisdiction over the title to lands in another State or country;<sup>2</sup> but where the court acquires jurisdiction of the person it can compel him to execute a conveyance which will be effective to pass the title.<sup>3</sup> As a general rule, when the transfer of property is necessary, the court cannot order a conveyance of it by a master or person other than the owner, except under the express or implied authority of a statute.<sup>4</sup> A decree of partition in chancery does not operate as a conveyance of the title, but simply orders the parties to make the necessary conveyances. By statute in many of the States, however, the court is authorized to appoint a commissioner to execute the conveyances in the names of the parties.<sup>5</sup> Under the Con-

<sup>1</sup> *Bailey v. Stiles*, 2 N. J. Eq. 220. In an action to establish the validity of a will in a court of general law and equity jurisdiction, defendant consented to judgment against him for the relief demanded in the complaint. It was held that the court had power to enter judgment perpetually enjoining defendants from impeaching the will or making any claim in contravention thereof, even though the bill failed to state a case for equitable relief. *Anderson v. Carr*, 19 N. Y. Supl. 992.

<sup>2</sup> *Vreeland v. Vreeland*, 49 N. J. Eq. 322. See *Burnley v. Stevenson*, 24 Ohio St. 474; *Carpenter v. Strange*, 141 U. S. 87, 106; *Appeal of Thomas*, 181 Pa. St. 298.

<sup>3</sup> *Schindelholz v. Cullum*, 55 Fed. Rep. 885, 889; *Vreeland v. Vreeland*, 49 N. J. Eq. 322; *Phelps v. McDonald*, 99 U. S. 298, 308; *Brown v. Desmond*, 100 Mass. 267; *Olney v. Eaton*,

66 Mo. 563; *Gardner v. Ogden*, 23 N. Y. 332; *Carrington v. Brentz*, 1 McLean, 167; *McGee v. Sweeney*, 84 Cal. 100.

<sup>4</sup> *Wilson v. Martin-Wilson & Co.*, 151 Mass. 515, holding that under the Massachusetts statutes of 1884, chapter 285, section 1, a court of equity may order a conveyance of a debtor's property, upon his refusal to convey it, by a master or other person appointed for that purpose, whenever it is deemed necessary or proper in order to apply it to the payment of a debt, conformably to the statute. Where a deed is set aside as constructively fraudulent it is usual to direct a release and reconveyance by the party claiming under the deed with a covenant against his own acts. *Dey v. Dunham*, 2 Johns. Ch. 182.

<sup>5</sup> *Gay v. Parpart*, 106 U. S. 679.

necticut statute, which provides that courts of equity may pass title to real estate without any act of the defendant, the title passes by the decree only as of the date of the decree, and does not relate back to the commencement of the suit.<sup>1</sup> By force of the New Jersey statute a decree directing a conveyance to be made vests the estate, so that the rights of the parties, in case of a variance between the terms of the decree and of the conveyance, must depend upon the former rather than upon the latter; and the terms of such decree must be construed precisely as the conveyance itself would be.<sup>2</sup> A decree for the conveyance of real estate must, in order to pass the title under the North Carolina code, declare that it shall be regarded as a deed of conveyance, and a decree which does not so declare does not close the action in which it was rendered.<sup>3</sup> Under the Nebraska code, providing that when a decree shall be rendered in any court of the State for a conveyance, and the parties do not comply therewith within the specified time, it shall have the same effect as if the conveyance had been made conformable thereto, such decree conveys the legal title as fully as if the conveyance had been made by the parties themselves.<sup>4</sup>

§ 804. *Decrees reforming instruments.*—Where a court of equity reforms a conveyance or instrument by making it such as the parties intended, it is not done by erasures or interlineations, but by a decree stating the reform required, with such orders for injunction and releases as may be necessary and proper to carry the decree into effect.<sup>5</sup>

<sup>1</sup> *King v. Bill*, 28 Conn. 593.

<sup>2</sup> *Price v. Sisson*, 18 N. J. Eq. 163.

<sup>3</sup> *Morris v. White*, 96 N. C. 91; s. c., 2 S. E. Rep. 254.

<sup>4</sup> *Langdon v. Sherwood*, 124 U. S. 74; s. c., 8 S. Ct. Rep. 429. A decree of a court of chancery which establishes that lands have been purchased by a husband with his wife's separate estate will not divest the husband and his grantees of the legal title to the land, and vest it in the wife, though it in express terms purports to do so, as the statutes of Alabama do not give chancery courts

authority to transfer title from one party litigant to another by mere decree, except on a party's failure to comply with directions therein fixing a specified time by which the conveyance shall be made. *Prewitt v. Ashford*, 90 Ala. 294; s. c., 7 So. Rep. 881.

<sup>5</sup> *Gillespie v. Moon*, 2 Johns. Ch. 585, 602; *Craig v. Kittredge*, 28 N. H. 281, 286; *Smith v. Greeley*, 14 N. H. 378, a suit to reform a deed, in which the following decree was entered:—"It having been clearly proved and admitted in the hearing of the cause

§ 805. **Frame of decrees.**—Decrees in general consist of four parts, viz.: the date and title, the recitals, the declaratory part, and the ordering or mandatory part.<sup>1</sup> A decree usually commences with a recital of the day, month and year when it was pronounced,<sup>2</sup> and of the names of the several parties to the cause, who should have the same titles in the decree as they have in the bill.<sup>3</sup> Formerly decrees contained recitals of the pleadings, evidence and proceedings in the cause.<sup>4</sup> Where the suit seeks a declaration of the rights of the parties, the ordering part of the decree should be prefaced by such a declaration.<sup>5</sup> Sometimes the reasons for making the declarations

that in making the deed from Howe to the plaintiff a mistake was made by inserting, etc., instead of, etc., it is considered by the court here that equity and good conscience require that the deed should be reformed and corrected by substituting, etc., and that the title to the lot which would be conveyed by the deed as thus corrected be confirmed and established to the plaintiff so far as may be consistent with the legal rights of other persons not parties hereunto. And it is ordered and decreed that the respondents be perpetually enjoined from claiming, possessing, conveying or in any other manner interfering with the contract so truly described as aforesaid, and for the purpose of enabling each party to be quieted and to have their several rights appear on the public records, that the defendants execute deeds of release accordingly."

<sup>1</sup> 2 Daniell's Ch. Pr. (2d ed.) 1001. Objections to the form of a decree must be presented by a motion to modify. A general exception will not save the point for review on appeal. *Stout v. Curry*, 110 Ind. 514; s. c., 11 N. E. Rep. 487.

<sup>2</sup> Daniell's Ch. Pr. (5th ed.) 1001. The caption should correspond with the time of the actual entry of the decree. *Barclay v. Brown*, 7 Paige,

245. In *McClaskey v. Barr*, 48 Fed. Rep. 180, the date of the actual hearing was inserted in the decree, that it might affirmatively appear to have been had before certain persons were made defendants, as bearing upon formal objections made by them.

<sup>3</sup> 2 Daniell's Ch. Pr. (2d ed.) 1002.

<sup>4</sup> See § 806, *infra*. A decree is not erroneous for failing to pass upon a demurrer if it in effect disposes of it, although not in terms mentioning it. *Smith's Ex'r v. Proffit's Adm'r*, 83 Va. 832; s. c., 1 S. E. Rep. 67. Where the decree on a bill of interpleader fully settles the rights of the parties, the fact that a separate decree or order of interpleader was not entered is immaterial. *People's Sav. Bank v. Look*, 54 N. W. Rep. 629.

<sup>5</sup> 2 Daniell's Ch. Pr. (5th ed.) 1004. Upon a bill in equity, brought to compel a conveyance, it appeared that, upon a proper view of the law, the legal title was already in plaintiff, and that the public records, when supplemented by proof of the death of certain persons, showed it to be so. The defendant, however, rested his case upon a claim of title in him which was not maintainable. It was held that plaintiff might have a decree declaring his title. *Moore v. Stinson*, 144 Mass. 594; s. c., 12 N. E. Rep. 410.

are inserted,<sup>1</sup> but it is said that this is not usually done, though its utility has been recognized.<sup>2</sup> Whenever a decree is made by consent it should be so stated in the decree.<sup>3</sup> The ordering or mandatory part of the decree contains the specific directions of the court upon the matter before it.<sup>4</sup> These directions, it is obvious, must depend upon the nature of the particular case which is the subject of the decree.<sup>5</sup> Where the decree is merely interlocutory, and directs an issue or an inquiry to be made or account to be taken before a master, it usually contains a reservation of the further matters to be decided, and generally also of the costs of the suit till after the event of the issue or reference shall be known.<sup>6</sup>

§ 806. *Recitals and findings of facts.*—In England the decree always recited the substance of the bill and answer, and the pleadings, and also the facts on which the court founded its decree. But in this country the decree does not ordinarily recite these, and generally not the facts on which the decree is founded. But the bill and answer, and other pleadings, together with the decree, constitute what is properly considered as the record.<sup>7</sup> A decree in chancery need not, by the practice in Massachusetts, set forth the evidence or recite the facts on which it is based;<sup>8</sup> and in Washington, while

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1004; Gordon v. Gordon, 3 Swanst. 400, 478; Maynard v. Moseley, 8 Swanst. 353; Attorney-General v. Clapham, 4 De G., M. & G. 591, 607.

<sup>2</sup> Bax v. Whitbread, 16 Ves. 15, 24.

<sup>3</sup> Seton on Decrees, 375; 1 Barbour's Ch. Pr. (2d ed.) 339; § 792, n. 1, *supra*.

<sup>4</sup> 1 Barbour's Ch. Pr. (2d ed.) 338.

<sup>5</sup> It is error to make a decree that, unless a certain sum be paid by a certain day, an execution shall issue, as this leaves a matter proper for a judicial decision to the determination of the clerk. Donalds v. Plumb, 8 Conn. 447. When a final decree is made, the court by injunction will restrain any proceedings at law which are inconsistent with the rights of the parties as established by such decree, and may insert a clause in the decree to

that effect. New York Dry Dock Co. v. American Ins. & Trust Co., 11 Paige, 384. In a suit for the correction of twenty-year bonds, so that the same should be ten-twentyies, brought after the expiration of ten years from their date, a decree for plaintiff is not erroneous which does not fix the time when the correction is to operate. Town of Essex v. Day, 52 Conn. 484.

<sup>6</sup> 1 Barbour's Ch. Pr. (2d ed.) 338.

<sup>7</sup> Whiting v. Bank of U. S., 18 Pet. 6. The recitals in a decree should not be argumentative, but should state merely the conclusions of law and fact. Dey v. Dunham, 2 Johns. Ch. 182.

<sup>8</sup> Mason v. Daly, 117 Mass. 404; 38th Rule in Chancery, 104 Mass. 575.

findings of fact and law are necessary in an action at law tried by the court without a jury, they are not essential to the validity of a judgment in a suit in equity.<sup>1</sup>

**§ 807. The same subject continued — Federal court rules.** A United States equity rule provides that, "In drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: — 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon on consideration thereof it was ordered, adjudged and decreed as follows, viz.'"<sup>2</sup> Despite this rule it has been said that the decree "may proceed to state conclusions of fact as well as of law, and often does so for the purpose of rendering the judgment of the court more clear and specific."<sup>3</sup> And where, in partition, persons not in possession established title to a certain interest in the lands by proving heirship to a remote owner, the court permitted the findings as to their pedigree to be recited in the decree, deeming such a course probably necessary to prevent further question as to the rights of the parties.<sup>4</sup>

**§ 808. The same subject continued — Connecticut, Indiana and Illinois rule.**— In Connecticut, under a statute which provides that "courts of equity shall cause the facts on which they found their decrees to appear in the record," a decree not accompanied by a finding is fatally defective.<sup>5</sup> But if the facts found as the basis of a decree are substantially the same as those alleged in the bill, it is not ground of error in the decree that they vary in some unimportant particulars.<sup>6</sup> Where there was a motion in error and a motion for a new trial, the latter not being permissible in equity causes, the facts found in the motion for new trial cannot be used as the finding of

<sup>1</sup> Kilroy v. Mitchell, 2 Wash. 407;      <sup>4</sup> McClaskey v. Barr, 48 Fed. Rep. a. c., 26 Pac. Rep. 865.      180.

<sup>2</sup> United States Equity Rule 86.

<sup>5</sup> Sturdevant v. Stanton, 47 Conn.

<sup>3</sup> Putnam v. Day, 22 Wall. 67. See,      579. See, also, Samson v. Hunt, 1 also, Synnot v. Shaughnessy, 180 U. Root, 207.

S. 572.

<sup>6</sup> Beers v. Botsford, 18 Conn. 146

facts on which the decree was passed.<sup>1</sup> Where fraud is an inference of law from certain facts, it is not necessary that a court of equity in passing its decree should in terms find the fraud, but it is enough if the court finds the facts. It is otherwise where the fraud depends upon motives and intents; then the fraud must be found specifically.<sup>2</sup> In Indiana a special finding in a suit to set aside a chattel mortgage as fraudulent, which states some of the badges of fraud, but does not state as an ultimate fact that there was fraud, will not sustain a judgment for plaintiff.<sup>3</sup> In Illinois a decree which does not recite the facts proved will be reversed as not warranted by the evidence, when there are no depositions or master's report or certificate of the evidence on file in the case.<sup>4</sup> A recital in the decree that the cause was heard on the proofs taken and reported by the master cannot be contradicted by the clerk's certificate that there is no report of the master on the files.<sup>5</sup> The Illinois statute providing that in decrees against married women the evidence shall be set forth does not apply where the decree was based on the admissions of a demurrer.<sup>6</sup>

§ 809. The same subject continued — Utah.— In Utah findings of fact are required in all cases where issues of fact are tried without a jury, and they should be filed before the entry of the judgment or decree.<sup>7</sup> If additional findings are made without notice to the adverse party they may be stricken from the transcript on appeal.<sup>8</sup> A finding "that there was no such tenancy between the plaintiff and defendants in the mine in controversy as entitled the plaintiff to an account" is not sufficient to support a decree, being a mere

<sup>1</sup> *Samis v. King*, 40 Conn. 800.

<sup>2</sup> *Lavette v. Sage*, 29 Conn. 577.

<sup>3</sup> *Fletcher v. Martin*, 126 Ind. 55; s. c., 28 N. E. Rep. 686.

<sup>4</sup> *Baird v. Powers*, 181 Ill. 66; s. c., 23 N. E. Rep. 796. But a decree dismissing a cross-bill on the hearing is not invalidated by a failure to preserve the evidence. *Atkinson v. Chicago Tire & Spring Works* (Ill.), 27 N. E. Rep. 919.

<sup>5</sup> *Brown v. Miner*, 128 Ill. 148.

<sup>6</sup> *Heacock v. Hosmer*, 109 Ill. 245, by a divided court.

<sup>7</sup> *Kahn v. Central Smelting Co.*, 102 U. S. 641.

<sup>8</sup> *Kahn v. Central Smelting Co.*, 102 U. S. 641. The court in *Dakota* (Territory), after judgment entered and a finding of facts, made an additional finding of facts on a motion for a new trial. It was held that there was nothing to forbid it in the *Dakota Code of Civil Procedure* (§§ 266, 267). *North v. Peters*, 138 U. S. 272.



legal inference, not the finding of a fact.<sup>1</sup> In an action to quiet title, a finding that plaintiff is the owner in fee and entitled to the possession of the described parcel of land is a finding of an ultimate fact, and not a conclusion of law.<sup>2</sup>

**§ 810. Construction of decrees.**—Every decree in a suit in equity must be considered in connection with the pleadings, and if its language is broader than is required it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided.<sup>3</sup> Where a

<sup>1</sup> *Kahn v. Central Smelting Co.*, 102 U. S. 641. In an action, tried to the court, to determine the right to the use of the waters of a certain creek, the court found as a fact that defendant was a prior appropriator of a portion of the waters, the exact amount of which could not be stated; declared, as a conclusion of law, that defendant was entitled to the use of the waters to the amount appropriated by him; and decreed that defendant was entitled to take and use the waters to the amount of his prior appropriation. The decree entered upon such findings and conclusions was held erroneous, in that the issues of fact were not found, the conclusions of law were not stated, and the rights of the parties were not settled. *Nephi Irrigation Co. v. Jenkins* (Utah), 81 Pac. Rep. 986.

<sup>2</sup> *Yharra v. Sylvany* (Cal.), 81 Pac. Rep. 1114. The Code of Civil Procedure of Oklahoma, article 1, chapter 70, section 1, abolishes all distinction in pleading and practice between actions at law and suits in equity. Article 19, chapter 70, section 2, provides that on trial of questions of fact by the court it shall not be necessary for the court to state its findings except generally, "unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law

involved in the trial, in which case the court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be rendered accordingly." It was held to be error in an equity case to refuse a request of defendants that the court state the facts in writing and the conclusions of law thereon. *Thompson v. Russell* (Okla.), 82 Pac. Rep. 56.

<sup>3</sup> *Barnes v. Chicago & C. Ry. Co.*, 122 U. S. 1. For a decree void for uncertainty, see *Shepherd v. Peffer*, 138 U. S. 626. When a final decree in chancery is complete in itself, its language being intelligible, the bill and answer cannot be read for the purpose of limiting its force and controlling its legal effect. *Weehawken Ferry Co. v. Sisson*, 17 N. J. Eq. 476. Where a decree is so distinct and certain as to be understood without reference to the pleadings and other proceedings, it is not necessary to attach a copy of the proceedings to such decree when it is introduced in evidence in another suit. *Beck v. Henderson*, 76 Ga. 360. That a final decree is inconsistent with an interlocutory decree is immaterial, as the latter may be modified on final hearing. *Thompson v. White*, 76 Cal. 881; s. c., 18 Pac. Rep. 899. See § 685, *supra*.

decree, directing the order of application of funds in payment of certain notes, refers to such notes by their exhibit mark, without finding the amount and date of maturity of each, reference may be had to the pleadings on which such decree is based to ascertain the same.<sup>1</sup> A decree in an action to correct an erroneous description in a deed is not void because it misdescribes the premises, where reference is made therein to a conveyance containing a good description.<sup>2</sup>

**§ 811. Foreclosure decrees.**—The right to redeem is a favorite equity, and will not be taken away except upon a strict compliance with the steps necessary to divest it.<sup>3</sup> The finding of the amount due in a decree of foreclosure and sale is the foundation of the right of the mortgagee to proceed further, and if a larger amount than is actually due is ordered to be paid it is fatal to subsequent proceedings.<sup>4</sup> A decree of strict foreclosure which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, cannot be sustained.<sup>5</sup> It is not necessary

<sup>1</sup> *Redhead v. Baker* (Iowa), 58 N. W. Rep. 114.

<sup>2</sup> *Thain v. Rudisill*, 126 Ind. 272; s. c., 26 N. E. Rep. 46. A decree in partition stated patent title in Solon W. M., and a conveyance thereafter by "said John W. M." It was held that the whole decree might be read together to establish that "Solon" and "John" designated one and the same person. *Gage v. Goudy*, 141 Ill. 215; s. c., 30 N. E. Rep. 320. Where there was a decree for an account, and that the defendants pay to the complainant the amount found due on such account, and a reference accordingly, and on the coming in of the master's report, which was duly confirmed, reporting a sum due from the defendants to the complainant, an order for an execution to make the money was entered, it was held that the decree and order together constituted an adjudication that the

amount reported was due from the defendants to the complainant, and that the execution was properly awarded and issued thereon. *Ruckman v. Decker*, 28 N. J. Eq. 5.

<sup>3</sup> *Chicago, Danville &c. R. Co. v. Fosdick*, 106 U. S. 82.

<sup>4</sup> *Chicago, Danville &c. R. Co. v. Fosdick*, 106 U. S. 82. See, also, *Central R. Co. v. Central Trust Co.*, 183 U. S. 83. The decree need not ascertain the amount due on a mortgage prior to the one foreclosed. *Stratton v. Reisdorph* (Neb.), 58 N. W. Rep. 186.

<sup>5</sup> *Clark v. Reyburn*, 8 Wall. 818. A decree for a foreclosure unless a certain sum be paid must be supported by a finding that this sum is due upon the mortgage. *Goodrich v. Stanley*, 28 Conn. 79. On a bill for foreclosure the time to redeem may be enlarged upon equitable terms and according to circumstances; but this practice applies only to

that a decree of foreclosure and sale should describe the premises precisely; it is usual to designate them in the decree by reference to the bill.<sup>1</sup>

**§ 812. Interlocutory decree for a sale.**—In a decree of foreclosure of railroad property it is proper to make an order of sale subject to the rights and equities of parties to the suit under liens or judgments claimed by them, and to reserve such rights for further adjudication.<sup>2</sup> In proceedings for the foreclosure of two railroad mortgages it was held to be within the power of the court, and a proper exercise of its discretion, to order a sale before the rights of the parties under the several mortgages had been fully determined and ascertained, the trustees, a majority of the bondholders, and the company itself, asking for an immediate sale.<sup>3</sup>

**§ 813. Deficiency decree on foreclosure suits.**—According to the English chancery practice, it was formerly decided in the federal courts that after a decree of foreclosure and sale, and confirmation thereof, it was erroneous to direct execution for the balance of the debt.<sup>4</sup>

strict foreclosures and not to decrees for a sale of the mortgaged premises. *Perine v. Dunn* (1819), 4 Johns. Ch. 140. A sale under foreclosure is not invalid because made under the latter of two decrees, differing only in the manner of describing the property, both purporting to be final, and having been entered at the same term. The court said:—"The addition to the original decree could be made by the court during the term in which that decree was rendered. The court could lose jurisdiction over it only by the adjournment of the term with no motion pending respecting it. It would have been more orderly and convenient to have referred to the first one and stated in what particular the latter was intended to modify, supplement or supersede the former, but this was not essential." *Barrell v. Tilton*, 119 U. S. 637.

<sup>1</sup> *McGee v. Smith*, 16 N. J. Eq. 463.

<sup>2</sup> *Sage v. Central R. Co.*, 99 U. S. 384.

<sup>3</sup> *First National Bank &c. v. Shedd*, 121 U. S. 74. But in this class of cases the court will never make an interlocutory order for an immediate sale upon terms discharging the lien of a mortgage not yet due, unless it clearly appears not only that in the end there must be a sale of the property, but a sale upon those terms. *Penn. R. Co. v. Allegheny Val. R. Co.*, 42 Fed. Rep. 82.

<sup>4</sup> *Noonan v. Braley*, 2 Black, 499; *Orchard v. Hughes*, 1 Wall. 73, holding that the rule extended to a territorial court. Under Equity Rule 92, in suits for foreclosure of mortgages "a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales," but such a decree must be supported by alle-

**§ 814. Sale must be authorized by decree.**—An interlocutory decree in a suit for division of partnership property, in which no authority was given to sell until a commission had reported, and the court had passed on the report, does not authorize a sale.<sup>1</sup> It is doubtful if a sale in chancery without a decree to support it can be made valid by a subsequent general order of confirmation.<sup>2</sup>

**§ 815. Rules regulating decrees for sale.**—On a foreclosure for interest the general rule is that only so much of the property as may be necessary to raise the amount of the interest in default shall be sold.<sup>3</sup> If the premises are incapable of being sold in parcels or of being divided without injury, the whole may be sold, though the whole of the debt is not due, and the proceeds applied to pay the interest and costs and the surplus to the discharge of the principal of the debt.<sup>4</sup>

gations in the bill showing that the amount is due. *Central R. Co. v. Central Trust Co.*, 183 U. S. 88. United States Revised Statutes, section 808, relating to the District of Columbia, and providing for a personal decree in proceedings to enforce a lien, applies to suits for the foreclosure of deeds of trust in the nature of mortgages to secure the payment of money. *Dodge v. Freeman's Savings &c. Co.*, 106 U. S. 445. In New Jersey a party defendant in a foreclosure suit cannot be held liable for a deficiency prayed against him, unless a ticket or notice to that effect be served on him with the subpoena to answer, in compliance with Rule 53. *Libby v. Rennie*, 81 N. J. Eq. 42.

<sup>1</sup> *Gray v. Brignardello*, 1 Wall. 627. On the failure of the purchaser at a judicial sale to comply with its terms, the court made an order requiring him to show cause. The purchaser failed to do so, but filed with the master his written consent that the lands should be resold at his risk, and during the pendency of the proceeding to compel the purchaser

to comply with said terms, and without any new order of sale, the master resold the lands for an inadequate price. It was held that the master had no power to make the latter sale, and that it was invalid and must be set aside. *Paulk v. Paulk*, 28 S. C. 481; s. c., 6 S. E. Rep. 830.

<sup>2</sup> *Milwaukee &c. R. Co. v. Soutter*, 2 Wall. 510; *Gray v. Brignardello*, 1 Wall. 627.

<sup>3</sup> *McFadden v. May's Landing &c. R. Co.*, 49 N. J. Eq. 176. Where a suit for foreclosure is brought for overdue interest the complainant may have a decree *nisi* for the amount due and for a sale of the property upon default in payment. Upon the payment of the amount due the foreclosure decree will be suspended until default again occurs in the payment of interest. *Farmers' L. & T. Co. v. Chicago &c. Ry. Co.*, 27 Fed. Rep. 146.

<sup>4</sup> *Campbell v. Macomb*, 4 Johns. Ch. 584. Where mortgaged premises are an inadequate security for the debt and the mortgagor is irresponsible, the court, although the en-

Permission to bondholders, who are mortgagees, to purchase at a sale of the mortgaged property, and to pay by their bonds, is not only usual but highly advantageous to all persons who have an interest.<sup>1</sup> When the court departs from the general rule of selling property at public auction, it should be fully informed as to its probable value. A private sale ought not to be made at a valuation fixed by a single witness.<sup>2</sup>

**§ 816. Proceedings under decrees for sale generally.—**

The usual mode of selling property under a decree or order in chancery is a direction that it shall be sold with the approbation of a master in chancery to whom the execution of the decree in that particular has been confided.<sup>3</sup> The master's report approving the sale becomes the basis of a motion to the court by the purchaser that his purchase may be confirmed.<sup>4</sup> Notice of the motion is given to the solicitor in the

tire mortgage debt is not due, will order the whole of the premises to be sold or so much as is necessary to pay the whole debt and costs, unless the defendant pays to the complainant the sum which will become due before the sale and gives ample security for payment of the residue when it becomes due. *Suffern v. Johnson*, 1 Paige, 450. Although a decree directs the sale of the whole of the mortgaged premises, the court may, if the property be divisible, order, after execution issued, that only such parts be sold as may be necessary to pay the amount due on the decree. *Allen v. Wood*, 31 N. J. Eq. 103, 105. See, also, *American L. & F. Ins. Co. v. Ryerson*, 6 N. J. Eq. 9. The sale of a plantation and the personalty on it, under a mortgage, in block instead of separately, is only an irregularity, for which the sale will not be disturbed on the complaint of a creditor who fails to show that a larger sum will be realized on a resale of the properties separately. *Stockmeyer v. Tobin*, 139 U. S. 176; s. c., 11 S. Ct. Rep. 504.

A decree and execution may be amended by an order directing that the mortgaged premises be sold in a different manner from that directed by the decree and execution. Such amendment cannot injuriously affect the title acquired by the purchaser at the sheriff's sale. "It has been the practice of this court to make such amendments in that manner in the interest of all parties, thus to provide for the sale of the mortgaged premises in the most advantageous way. The subject is thoroughly under the control of the court." *Equitable Life Ass. Soc. v. Laird*, 24 N. J. Eq. 319, 327. See *Lithauer v. Royle*, 17 N. J. Eq. 40.

<sup>1</sup> *Ketchum v. Duncan*, 96 U. S. 659.

<sup>2</sup> *Bound v. South Carolina Ry. Co.*, 46 Fed. Rep. 815. Where a decree requires land to be sold at public sale, a private sale by the commissioner is void. *Hutson v. Sadler*, 31 West Va. 358; s. c., 6 S. E. Rep. 920.

<sup>3</sup> *Williamson v. Berry*, 8 How. 546.

<sup>4</sup> *Williamson v. Berry*, 8 How. 546.

cause, and confirmation *nisi* is ordered by the court, to become absolute in a time stated unless cause is shown against it.<sup>1</sup> Then, unless the purchaser calls for an investigation of the title by the master, it is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree for sale, his approval of it, and the confirmation by the court of the sale in the manner that such confirmation has been ordered.<sup>2</sup>

§ 817. The same subject continued — Subsequent adjustment of priorities.— The practice that should be followed in cases of railroad foreclosures in the federal courts, where a sale of the property is had before the rights of all intervening parties are determined, and where by the terms of the decree the court reserves full power to hear such matters after the sale, with the right to subject the property and its proceeds to the payment of claims finally adjudged to be prior to the lien of the mortgage, has been laid down as follows:—"When a sale is made under a decree of the kind described, it is the duty of the purchaser, upon a confirmation of the sale, to make himself a party to the foreclosure proceedings, by filing therein a supplemental bill or petition of intervention setting forth the fact that he has by purchase of the property become a party in interest, thus showing that he has become subject to the burdens and entitled to the benefits of the decree under which he has purchased the property. Furthermore, if the purchaser does not reside within the territorial limits of the jurisdiction of the court, he should appear by an attorney who is a member of the bar of the court having charge of the foreclosure proceedings, so that when need arises the court

<sup>1</sup> Williamson v. Berry, 8 How. 546. Confirmation may be made upon terms. Farmers' L. & T. Co. v. Green Bay & C. R. Co., 10 Biss. 208; s. c., 6 Fed. Rep. 100; Farmers' L. & T. Co. v. Central R. R., 17 Fed. Rep. 758.

<sup>2</sup> Williamson v. Berry, 8 How. 546. It is no defense to a rule on the master requiring him to make a deed to the purchaser at a sale made by him under a decree of foreclosure that an appeal has been taken from

the decree where the appeal does not operate as a *supersedeas*. Union Mut. L. Ins. Co. v. Windett, 86 Fed. Rep. 898. It is the constant practice of the court to permit the purchaser at a master's sale to assign his bid and to direct the conveyance to be made to the assignee, without prejudice, however, to any equitable rights or liens of third persons which become vested before such assignment. Proctor v. Farnham, 5 Paige, 614.

may be enabled to have before it all persons interested in resisting the allowance or payment of claims which are asserted to be entitled to priority of payment." If he fails to make application, "then the court should by appropriate action compel the purchaser to become a party to the record." If he makes himself a party, "then it will be the duty of the circuit court to cause notice to be given him before passing upon intervening claims, or directing their payment from the fund in court, and thus full opportunity will be afforded all parties interested to be heard for the protection of their rights."<sup>1</sup>

**§ 818. Foreclosure sales, by whom conducted.**—Sales of mortgaged premises under a decree of foreclosure and sale in the federal courts are usually made by the marshal of the district where the decree was entered, or by a master appointed by the court, as directed in the decree.<sup>2</sup> In the absence of a statutory provision the general rule is that judicial sales shall be made in the presence and under the immediate supervision of the officer designated in the decree commanding the sale.<sup>3</sup> A sheriff cannot make a valid sale by a special deputy under parol appointment,<sup>4</sup> or by an assistant,

<sup>1</sup> Per Shiras, J., in *Fitzgerald v. Evans*, 49 Fed. Rep. 426, 429. The dismissal of an appeal in the case also emphasizes the importance of becoming a party on the record if he desires to avail himself of the right of appeal.

<sup>2</sup> *Blossom v. Milwaukee & Co. R. Co.*, 3 Wall. 196. A foreclosure sale by a master who has neglected to give the required security upon his appointment to office cannot be impeached collaterally. *Nicholl v. Nicholl*, 8 Paige, 349. Sales made in South Carolina under order of court in counties where there is no master may be ordered made by the sheriff. *Childs v. Alexander*, 22 S. C. 169. Upon a decree for a sale by a master, for the benefit of some of the defendants in the suit as well as for the benefit of

the complainant, the complainant's solicitor is entitled to select the master and to place the decree in his hands to be executed, unless the court has directed otherwise. *Watt v. Crawford*, 11 Paige, 470. See, also, *Brown v. Frost*, Hoff. Ch. 41. Sales after decree of foreclosure are usually conducted under the advice of the solicitor of the complainants; but his instructions, if oppressive to the respondents or unreasonable, cannot control the officer, because the latter has duties to perform to the respondent as well as to the complainant, and to the court as well as to the parties. *Blossom v. Milwaukee & Co. R. Co.*, 3 Wall. 196.

<sup>3</sup> *Meyer v. Bishop*, 27 N. J. Eq. 141.

<sup>4</sup> *Meyer v. Patterson*, 28 N. J. Eq. 289.

under a general verbal direction to make the sale and adjournments necessary on a given day.<sup>1</sup> Under a decree directing a sale by a master "residing in the city of New York," a sale made by a master residing in another county was held to be void.<sup>2</sup>

**§ 819. Conduct of sale.**—It is not absolutely necessary that the title of the cause should be inserted in the master's notice of sale under a decree; but it is proper that such title should be briefly stated for the purpose of attracting the attention of parties who may be interested in the premises.<sup>3</sup> A statement of the amount of the decree in the notice of sale, though proper, is not essential.<sup>4</sup> The sale should be advertised at least twice, and should contain a reasonably accurate description of the property.<sup>5</sup> Where the name of a newspaper was changed after an order to advertise a foreclosure sale in it, but its identity remained, it was held proper to advertise in it under the order.<sup>6</sup> An officer conducting a sale under order of court possesses the power for good cause shown to adjourn the sale, and, if the interests of the parties require it, he is bound to exercise a sound discretion on the subject.<sup>7</sup> Where the day fixed for the sale of mortgaged premises is afterwards appointed a legal holiday, the officer should adjourn the sale. In such case the advertisement is not rendered invalid.<sup>8</sup> Where a sale is adjourned no publication of adjournment is necessary.<sup>9</sup> The officer conducting the sale may adopt conditions of sale amply sufficient to secure compliance by the purchaser with his bid, but he cannot impose any liability on the purchaser with respect to the property sold which would

<sup>1</sup> *Meyer v. Bishop*, 37 N. J. Eq. 141.

<sup>2</sup> *Gates v. Woodruff*, 4 Edw. Ch. 700.

<sup>3</sup> *Ray v. Oliver*, 6 Paige, 489.

<sup>4</sup> *Stratton v. Reisdorph* (Neb.), 58 N. W. Rep. 186.

<sup>5</sup> *Kauffman v. Walker*, 9 Md. 229; *Merwin v. Smith*, 2 N. J. Eq. 182.

<sup>6</sup> *Sage v. Central R. Co.*, 99 U. S. 334. A sale advertised for a specified day between the hours of twelve and five o'clock in the afternoon will

not be set aside on that ground, although it would have been more proper to state the particular hour. *Coxe v. Halsted*, 2 N. J. Eq. 811.

<sup>7</sup> *Blossom v. Milwaukee &c. R. Co.*, 8 Wall. 196. See *Bethlehem Iron Co. v. Phila. &c. Ry. Co.*, 49 N. J. Eq. 856; *Seaman v. Riggins*, 2 N. J. Eq. 214.

<sup>8</sup> *White v. Zust*, 28 N. J. Eq. 107.

<sup>9</sup> *Coxe v. Halsted*, 2 N. J. Eq. 811.



not result by law from his purchase.<sup>1</sup> Unless the decree directs the master to subdivide and sell in parcels, he is not compelled to do so.<sup>2</sup> "The general rule is well settled that where a tract of land is divided into distinct parcels, it must be sold in that way."<sup>3</sup>

§ 820. **Authority to set aside sale.**— Auction sales under a decretal order are always regarded as under the control of the court to set the sale aside or open it, if the circumstances of the case require it, before it has been confirmed.<sup>4</sup> If the court is deceived by the report of a receiver or master as to the conditions upon which property is sold under its order, and the purchaser participates in the deception, the court can, at any time before the rights of third parties have intervened, set aside the whole proceedings, including the deed. But after the rights of such third parties have accrued, its authority in that respect can only be exercised consistently with protection to those rights.<sup>5</sup>

§ 821. **The same subject continued — Grounds for setting aside.**— To justify the interference of the court there must be fraud, mistake, or some accident by which the rights of the parties have been affected.<sup>6</sup> "Conversely there can be

<sup>1</sup> *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548.

<sup>2</sup> *Woodhull v. Osborne*, 2 Edw. Ch. 620. See, also, *Suffern v. Johnson*, 1 Paige, 450.

<sup>3</sup> *Coxe v. Halsted*, 2 N. J. Eq. 311, 319; *Corles v. Lashley*, 15 N. J. Eq. 116. In respect of a railroad foreclosure sale it seems that there is no authority for selling by piecemeal parcels of the property except by the consent of all persons interested expressed either in open court or in writing. See *Bound v. South Carolina Ry. Co.*, 46 Fed. Rep. 315, 316; *Kneeland v. Trust Co.*, 136 U. S. 89.

<sup>4</sup> *Blossom v. Milwaukee &c. R. Co.*, 3 Wall. 196; *Woodward v. Bullock*, 27 N. J. Eq. 507.

<sup>5</sup> *Koontz v. Northern Bank &c.*, 16 Wall. 196. A sale under a decree in

chancery may be set aside, even after deed delivered, by an order made in the original cause, either for impropriety in the sale or for the purpose of letting in a defense to the action. *Mutual Life Ins. Co. v. Sturges* (1880), 33 N. J. Eq. 328; *National Bank v. Sprague*, 21 N. J. Eq. 458. Under the practice in New Jersey, a sale, after delivery of the deed, will be opened on petition on the same grounds as, under the English practice, a sale would be opened after confirmation. *Campbell v. Gardner*, 11 N. J. Eq. 428.

<sup>6</sup> *Seaman v. Riggins*, 2 N. J. Eq. 214. Inadequacy of price alone insufficient. *Francis v. Church*, *Clarke's Ch.* 475; *Mott v. Walkley*, 3 Edw. Ch. 590; *White v. Zust*, 28 N. J. Eq. 108; *Brown v. Frost*, 10 Paige, 248;

no doubt that a person whose property has been sold at judicial sale, to his injury, may always, if he applies promptly and is without fault, have the sale set aside upon showing that he was prevented from attending the sale by fraud, mistake or accident."<sup>1</sup> A sale will not be set aside because the terms of sale are unusually strict or severe, if the circumstances of the case call for rigid measures and no disposition is manifested to oppress or injure the defendant.<sup>2</sup> A sale under a railroad mortgage, where the amount of bonds in the hands of *bona fide* holders was less than \$200,000, and the notice of sale set forth that the mortgage debt was \$2,000,000, and that \$70,000 interest was due, was set aside as grossly fraudulent and unjust.<sup>3</sup>

Garitee v. Popplein (Md.), 20 Atl. Rep. 1070. See, also, Boyd v. Hudson City &c. Society, 24 N. J. Eq. 349; Cline v. Prall, 27 N. J. Eq. 415. But it may avail in conjunction with other equitable circumstances. Wetzler v. Schaumann, 24 N. J. Eq. 60; Van Arsdalen v. Vail, 32 N. J. Eq. 189; Van Dyke v. Van Dyke, 31 N. J. Eq. 176; New Jersey S. F. Comm'rs v. Peters, 32 N. J. Eq. 118; Smith v. Alton, 23 N. J. Eq. 572; Rea's Ex'r v. Wheeler, 27 N. J. Eq. 292; James v. Milwaukee &c. R. Co., 6 Wall. 752; Campbell v. Gardner, 11 N. J. Eq. 423; Morris v. Woodward, 25 N. J. Eq. 32. Sales may be set aside on the ground of surprise or misapprehension created by conduct of the parties. Woodward v. Bullock, 27 N. J. Eq. 507; Dawson v. Drake, 29 N. J. Eq. 383; Van Winkle v. Stearns, 27 N. J. Eq. 238; Large v. Ditmars, 27 N. J. Eq. 406; Barker v. Richardson, 41 N. J. Eq. 656 (after an *ex parte* confirmation); Hewitt v. Montclair Ry. Co., 25 N. J. Eq. 392; Seaman v. Riggins, 2 N. J. Eq. 214; Chamberlain v. Larned, 32 N. J. Eq. 295 (sale after one hundred and fifty-three adjournments, rendering the original advertisement

practically obsolete); Bell v. Vreeland, 35 N. J. Eq. 22; Nevins v. Egbert, 31 N. J. Eq. 460; or for misrepresentations to bidders, Woodward v. Bullock, 27 N. J. Eq. 507. Ignorance of legal effect of purchase is an insufficient ground. Mott v. Shreve, 25 N. J. Eq. 433. See, also, Hayes v. Stiger, 29 N. J. Eq. 196. Reasonable refusal to adjourn a sale is insufficient. Morris v. Woodward, 25 N. J. Eq. 32. On petition by a purchaser at foreclosure sale to set it aside, the court said: — "While contracts of this description are, very properly, said to be made with the court, and therefore the court may exercise a greater power over them than it can over any other class of contracts, still, it cannot rescind them without an equitable or legal reason sufficient to justify its action." Hayes v. Stiger, 29 N. J. Eq. 196, 198.

<sup>1</sup>Per Van Fleet v. C., in Mutual Life Ins. Co. v. Goddard, 33 N. J. Eq. 432, 433.

<sup>2</sup>Coxe v. Halsted, 2 N. J. Eq. 311.

<sup>3</sup>James v. Milwaukee &c. R. Co., 6 Wall. 752. See, also, Laight v. Pell, 1 Edw. Ch. 577. It seems that a master is liable for the costs of setting aside his report of sale and of the

§ 822. The same subject continued — Application and parties.—No person can apply to open a sale under a decree of foreclosure unless he is a party to the suit, or has some interest in the mortgaged premises; and such interest must appear on the face of his petition. He cannot set up, at the hearing, an interest in the premises other than that which appears in the petition.<sup>1</sup> After a sale of a railroad on foreclosure, one who had no interest in the matter at the time of the sale and confirmation, but who alleged that he subsequently became the equitable owner of some of the bonds secured by the mortgage that was foreclosed, was not permitted to interfere to set the sale aside.<sup>2</sup> A party who has notice of the suit, and does not appear and make defense, has no right to ask to have the sale opened on any ground which he might have interposed as a defense unless he was prevented from making his defense by fraud or mistake. Even then, if he is present at and consents to the sale, he thereby waives his rights.<sup>3</sup> On an application by petition, verified by affidavit of the party, to set aside a foreclosure sale, the material facts alleged in the petition must be proven. The affidavit of the party, except as to facts peculiarly within his own knowledge, must be supported by other evidence.<sup>4</sup>

§ 823. Form of remedy to set aside sales.—As a general rule while the suit is undecided — while it remains in court

consequent proceedings thereon, if his conduct has been grossly improper and oppressive. *Baring v. Moore*, 5 Paige, 46.

<sup>1</sup> *Day v. Lyon*, 11 N. J. Eq. 331. Where the complainant under foreclosure proceedings is the purchaser of the mortgaged premises, the sale may be set aside on petition; a bill is not necessary. *Meyer v. Bishop*, 27 N. J. Eq. 141. In sales by masters under decrees, purchasers who have bid off the property are entitled to a hearing upon the question whether the sales shall be set aside. *Blossom v. Milwaukee &c. R. Co.*, 1 Wall. 655. Where land fraudulently conveyed has been sold under a

decree on a creditor's bill, the debtor has no standing in court to have the sale set aside for unfairness or inadequacy of price. *Guest v. Barton*, 32 N. J. Eq. 120. A decree of foreclosure of railroad property and confirmation of sale in a suit by the trustee will not be set aside at the instance of a bondholder not actually a party to the suit, where there is no evidence that the trustee acted dishonestly or unfairly. *Smith v. Little Rock &c. Co.*, 100 U. S. 605.

<sup>2</sup> *Fleming v. La Crosse &c. R. Co.*, 2 Wall. 759.

<sup>3</sup> *Hall v. Urquhart*, 11 N. J. Eq. 318.

<sup>4</sup> *Coxe v. Halsted*, 2 N. J. Eq. 311.

and subject to its control—an original bill is not a proper remedy to impeach and set aside a sale.<sup>1</sup> Before it is perfected by confirmation, in the absence of some peculiar circumstances the fairness and regularity of the sale cannot be litigated in a collateral suit.<sup>2</sup> Any party in interest or the purchaser, if a stranger, who by his bid becomes a *quasi*-party, may move for or resist confirmation, as it is but seldom there can be either reason or justice in resorting to collateral remedies.<sup>3</sup> Whether after confirmation, or while the suit is still pending and undetermined, relief should be sought by petition in that suit, or more formally by an original bill, rests largely in the discretion of the court, and depends upon the particular situation of the case and the relation of the parties to it.<sup>4</sup> Where the original suit in which the decree of sale and confirmation were rendered has been determined finally—no longer remains in court and under its control—the proper remedy to impeach the sale and to obtain a resale is by original bill.<sup>5</sup>

§ 824. **Resale.**—Until the report of sale is confirmed, any person interested may make a summary application to the court for a resale; provided he has any just grounds to sustain the application.<sup>6</sup> “It has been held that a resale will be ordered in the following cases:—1. When there is fraud or misconduct in the purchaser or other person connected with and directing the sale. 2. Where there is a surprise upon any party in interest created by the conduct of the purchaser or other person directing the sale so that the party in interest is

<sup>1</sup> Sayre v. Elyton Land Co., 73 Ala. 85, 96.

<sup>2</sup> Sayre v. Elyton Land Co., 73 Ala. 85, 96; Hutton v. Williams, 35 Ala. 503; Brown v. Frost, 10 Paige, 243.

<sup>3</sup> Cases cited in the preceding note.

<sup>4</sup> Sayre v. Elyton Land Co., 73 Ala. 85, 96, 97; Codwise v. Gelston, 10 Johns. 521; Brown v. Frost, 10 Paige, 243; Tooley v. Kane, 1 Sm. & M. (Ch.) 518; Ashbee v. Cowell, Busb. Eq. (N. C.) 158; Campbell v. Gardner, 11 N. J. Eq. 428.

<sup>5</sup> Sayre v. Elyton Land Co., 73 Ala.

85, 96, 97; Coffey v. Coffey, 16 Ill. 241; Henderson v. Herrod, 28 Miss. 484; McMinn v. Phipps, 3 Sneed (Tenn.), 196; Crawford v. Tuller, 35 Mich. 57.

<sup>6</sup> Brown v. Frost, 10 Paige, 243. On a master's sale which reserves the right to keep the biddings open until the deposit is paid, and a purchaser refuses to pay the deposit, no order for a resale is necessary—the master may go on as if no sale had taken place. Hewlett v. Davis, 8 Edw. Ch. 838.

misled. 3. When the interests of infants are concerned in opening the sale. 4. When a guarantor who is liable to a personal decree has misunderstood his liability. It has never yet been decided that mere inadequacy of price was a sufficient reason of itself to open a sale."<sup>1</sup> Where the mortgagee is the purchaser the court will regard an application by the mortgagor for a resale with more indulgence than when a stranger is the purchaser.<sup>2</sup> The English practice, which permits the opening of a sale when an offer is made to pay a greater sum for the property, has not been adopted in New Jersey,<sup>3</sup> and did not obtain in the New York court of chancery.<sup>4</sup> In the federal courts the sale will be set aside before confirmation upon payment of the purchaser's expenses and a sufficient price in advance.<sup>5</sup>

§ 825. The same subject continued.—A decree ordering a resale, without regard to the previous payments by the purchaser, and the right to make such additional payments as should be ascertained to be due and required to be paid, was held erroneous.<sup>6</sup> A defendant who has appeared in the suit, and who has any interest in property sold by the master, or

<sup>1</sup> Per Whittlesey, V. C., in *Gardiner v. Schermerhorn*, Clarke's Ch. 101. A resale may be ordered where the purchaser neglects to comply with the terms of sale within a reasonable time. *Clark v. Hall*, 7 Paige, 886. A resale of premises sold under a foreclosure execution was ordered where one claiming an interest in the premises had, by neglect of her counsel, been deprived of an opportunity to protect that interest, and the property seemed not to have produced the "highest and best price it would bring in cash at the time of the sale," according to the statute. *Mutual Benefit L. Ins. Co. v. Gould*, 84 N. J. Eq. 417.

<sup>2</sup> *Campbell v. Gardner*, 11 N. J. Eq. 423. The court may order a resale for a default in payment without first exhausting collaterals, especially when the collaterals cannot be made

available without a suit. *Mosby v. Withers*, 80 Va. 82.

<sup>3</sup> *Seaman v. Riggins*, 2 N. J. Eq. 214; *Delaware &c. R. Co. v. Scranton*, 84 N. J. Eq. 429; *Bethlehem Iron Co. v. Phila. &c. Ry. Co.*, 49 N. J. Eq. 356.

<sup>4</sup> *Duncan v. Todd*, 2 Paige, 99; *Gardiner v. Schermerhorn*, Clarke's Ch. 101; *Francis v. Church*, Clarke's Ch. 475; *Woodhull v. Osborne*, 2 Edw. Ch. 614; *Williamson v. Dale*, 3 Johns. Ch. 290. See, also, *Trull v. Rice*, 92 N. C. 572; *Vaughan v. Gooch*, 92 N. C. 524.

<sup>5</sup> *Blackburn v. Selma R. Co.*, 3 Fed. Rep. 689.

<sup>6</sup> *District of Columbia v. McBlair*, 124 U. S. 820. The conditions of a judicial sale required a payment of ten per cent. down, and provided that if the bidder should not complete the sale the property should be

in the proceeds of the sale, is entitled to notice of an application to discharge the purchaser or for a resale.<sup>1</sup> A resale of mortgaged premises is only ordered upon terms; and the proper terms to be imposed depend upon the circumstances of each case.<sup>2</sup>

§ 826. **Enforcing sale against purchaser.**—Purchasers at sales under decrees, if not already parties to the suit, are regarded, to a certain extent, as parties to it, so as to be under the control of the court on the one hand and its protection on the other.<sup>3</sup> Such purchaser may therefore be compelled to complete his purchase and make his bid good by rule or attachment issuing out of the court under whose decree the sale is had.<sup>4</sup> But the parties in interest may, if they see fit, file a bill for specific performance, and sometimes the court will itself, in a case of doubt, and where the ends of justice will be served by it, give that shape to the litigation.<sup>5</sup> Such a bill

resold, the first purchaser not to be benefited by any advance, but to be chargeable with all loss and expense. A purchaser failed to complete the purchase, and a resale was made for a sum sufficient to pay interest on the first bid and the expense of the second sale. It was held that the first purchaser was entitled to have his ten per cent. refunded to him. *Chancellor v. Gummere*, 40 N. J. Eq. 279.

<sup>1</sup> *Robinson v. Meigs*, 10 Paige, 41. The papers on a motion for a resale of property sold under a mortgage, and bid in for plaintiff, are properly served on the attorney for plaintiff in the foreclosure suit, though plaintiff conveyed the property to a third person. *Bonnett v. Brown*, 13 N. Y. Supl. 895.

<sup>2</sup> *Francis v. Church*, *Clarke's Ch.* 475; *Hazard v. Hodges*, 17 N. J. Eq. 124. Where, after the confirmation of a judicial sale to enforce in favor of the vendor payment of the purchase money, an upset bid is offered, the court may attach to the privilege of

a resale such terms as in its discretion it sees fit to impose. *Yost v. Porter*, 80 Va. 855.

<sup>3</sup> *Silver v. Campbell*, 25 N. J. Eq. 465; *Terbell v. Lee*, 40 Fed. Rep. 40, 43; *Requa v. Rea*, 2 Paige, 389; *Ex'rs of Braasher v. Cortlandt*, 2 Johns. Ch. 505; *Bowne v. Ritter*, 26 N. J. Eq. 456.

<sup>4</sup> *Silver v. Campbell*, 25 N. J. Eq. 465; *Camden v. Mayhew*, 129 U. S. 78; *Gregory v. Tingley*, 18 Met. 818. Where, under a judicial sale, the purchaser's liability is to pay money, it cannot be discharged in any other thing against the wish of any party in interest. *Frazier v. Hendrem*, 80 Va. 265.

<sup>5</sup> *Bowne v. Ritter*, 26 N. J. Eq. 456. Although a bidder at a sheriff's sale under a foreclosure may, by his own wilfulness, have put himself in a position where the court would not, on his application, relieve him from the consequences of his bid, yet the court will refuse to compel the specific performance of such a bid where its enforcement must be un-

filed without direction of the court is not liable to demurrer by the purchaser on the ground that there is a more summary method of compelling him to abide by his contract.<sup>1</sup> The officer making a judicial sale representing all the parties in interest is the only necessary party complainant to a bill to enforce performance of an agreement to purchase.<sup>2</sup>

§ 827. *The same subject continued.*—In mortgage and partition sales in chancery if the premises are not sold at the risk of the purchaser he will not be compelled to complete the purchase in case the premises should be incumbered or no title should pass by the sale or there should be difficulty in obtaining possession.<sup>3</sup> The court will not compel the purchaser to complete his purchase when he will not obtain such an interest in the premises as he had a right to suppose, from the terms of the sale, he was buying when the property was struck off to him on his bid.<sup>4</sup> The court will not compel a purchaser to take the title where, by the fault of the parties, the completion of the sale has been delayed so long that he cannot have the benefit of his purchase substantially as if the sale had been completed at the time contemplated by the terms of the sale.<sup>5</sup> A purchaser at a judicial sale cannot be

just to the bidder and unconscionably advantageous to the mortgagee. *Sullivan v. Jennings*, 44 N. J. Eq. 11.

<sup>1</sup> *Bowne v. Ritter*, 26 N. J. Eq. 456.

<sup>2</sup> *Bowne v. Ritter*, 26 N. J. Eq. 456.

<sup>3</sup> *McGown v. Wilkins*, 1 Paige, 120; *Coster v. Clark*, 8 Edw. Ch. 428.

Where a purchaser at a master's sale purchases under the assurance that he is to receive a perfect title, if such title cannot be given he will not be compelled to complete the purchase. *Morris v. Mowatt*, 2 Paige, 586. The purchaser of lands at a partition sale cannot be compelled to take the title when it appears that the proceedings are voidable. *Crouter v. Crouter*, 17 N. Y. Supl. 758. The purchaser cannot object to the title merely on the ground that there is a possibility that some person other than the parties

to the suit has an interest in the premises, where there is no probability that any such interest exists. *Dunham v. Minard*, 4 Paige, 441.

<sup>4</sup> *Seaman v. Hicks*, 8 Paige, 655.

A second mortgagee foreclosed his mortgage without making the first mortgagee a party, and a purchaser at the sale bid \$1,150, and paid in cash \$125, when the value of the equity was merely nominal. Though culpably ignorant of the existence of the first mortgage the court refused to enforce the bid on petition of the complainant, and also declined to relieve the purchaser on his own petition, but left them to settle the matter at law. *Twining v. Neil*, 38 N. J. Eq. 470.

<sup>5</sup> *Clark v. Hall*, 7 Paige, 386.

heard, on an application to be discharged from his contract, to impeach the decree under which he purchased.<sup>1</sup>

**§ 828. Enforcing liability of purchaser for deficiency on resale.**— Where the purchaser at a sale under order of court refuses, without cause, to fulfill his contract, the court may, on a rule to show cause, order the estate to be resold, and the purchaser to pay the expense arising from the non-completion of the purchase, the application and the resale, and any deficiency in price arising upon the second sale.<sup>2</sup> Where the decree required that the sale should be made for cash on the day of the sale, the payment in cash on that day is a condition precedent to the right of the purchaser to demand a confirmation of the sale; and the confirmation of the sale by the court is not necessary in order to fix liability on him for a deficiency arising upon a resale.<sup>3</sup>

**§ 829. Title of the purchaser.**— The title of a purchaser under a foreclosure sale is co-extensive with the description contained in the mortgage, the bill to foreclose and the writ of *feri facias* under which the sale was made.<sup>4</sup> The buyer, in

<sup>1</sup>Shultz v. Sanders, 88 N. J. Eq. 154.

<sup>2</sup>Stuart v. Gay, 127 U. S. 518; Camden v. Mayhew, 129 U. S. 78. In the case first cited the court said: — "There was no reason for a resort to an original bill; the most suitable and convenient practice was to enforce the obligation of the purchaser in the same cause by a supplemental proceeding, and it was within the discretion of the court to adopt as the proper method in the case the form of a rule to show cause."

<sup>3</sup>Camden v. Mayhew, 129 U. S. 78. Where a distinct offer is made in open court to the bidder at a foreclosure sale to confirm the sale to him upon his complying with the terms thereof by paying in cash the amount of his bid, and the offer is refused, the court may, without a formal confirmation of the sale, order

a resale, holding him responsible for any deficiency resulting therefrom. Camden v. Mayhew, *supra*.

<sup>4</sup>McGee v. Smith, 16 N. J. Eq. 462, holding that a party to a foreclosure suit cannot contest the title of the purchaser under it, while the decree and the sale and the conveyance remain in force. A purchaser of land at sheriff's sale, made under *fl. fa.* in the foreclosure of a special mortgage, cannot acquire or take title to any other property than that coming within the description in the mortgage. Jones v. Lake (La.), 10 So. Rep. 204. A foreclosure and sale of premises does not cut off the equitable interest of a person in possession of the premises at the time of the mortgage and of the sale, unless he is made a party to the foreclosure proceedings. De Ruyter v. Trustees &c., 2 Barb. Ch. 556.



equity, becomes the owner from the day the report of the sale is confirmed, and the premises are then at his risk, even though he has not received a deed.<sup>1</sup> Equities of a mortgagee, proper for adjudication in the foreclosure suit, pass to the purchaser at the sale if not excepted from it.<sup>2</sup>

§ 830. *The same subject continued.*—A reversal of the decree under which a sale has been made, subsequent to the passage of title, will not nullify or disturb the purchaser's title.<sup>3</sup> But a court of equity can correct its decrees during the term in which they are entered; and one who, with notice of the proceedings, acquires an interest on the faith of a decree, takes it subject to the possibility of its correction or vacation.<sup>4</sup>

<sup>1</sup> *Gates v. Smith*, 4 Edw. Ch. 702.

<sup>2</sup> *Richter v. Jerome*, 123 U. S. 288.

<sup>3</sup> *Shultz v. Sanders*, 38 N. J. Eq. 154, where the court said:—"In such case the injured party must look for redress to the person who got the money for the land and not to the person who paid his money for the land under the sanction of a judicial sentence." See *Olcott v. Hendrick*, 141 U. S. 548, 547; *Bailey v. Fanning Orphan School* (Ky.), 14 S. W. Rep. 908; *Watson v. Ulbrich*, 18 Neb. 186. "The general principle that a purchaser under a decree is unaffected by error in the decree and has a right to presume that the court has properly investigated and adjudged the rights of the parties is well settled; and although the judgment or decree may be reversed, yet all the rights acquired at a judicial sale while it was in full force, and which it authorized, will be protected." Per

*Wallace, J.*, in *Phelps v. Elliott*, 35 Fed. Rep. 455, 460; *Dickinson v. City of Trenton*, 38 N. J. Eq. 68.

<sup>4</sup> *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25; s. c., 11 S. Ct. Rep. 691; *Hitchcock v. Same*, 140 U. S. 25; s. c., 11 S. Ct. Rep. 691. From considerations of public policy, a court of equity set aside a judicial sale. It was held that the *status* of the purchaser in possession from the time of his purchase to the time of the setting aside of the sale was not that of a tort-feasor or a trespasser, but rather that of a trustee, bound only to exercise ordinary care of the property, and not liable for rents which without his fault he did not receive; that he was liable for insurance money received by him, less the expense incurred in obtaining the insurance and collecting the money. *Bath South Carolina Paper Co. v. Langley*, 28 S. C. 120.

## CHAPTER XXV.

### CORRECTION OF DECREES BEFORE ENROLMENT.

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| <p>§ 831. Enrolment of decrees — Correction of clerical errors.</p> <p>832. Correction of decrees by rehearing — Generally.</p> <p>833. Rehearings discretionary.</p> <p>834. The same subject continued — Considerations governing discretion.</p> <p>835. Rules regulating discretion continued.</p> <p>836. Rehearing for new evidence.</p> <p>837. The same subject continued.</p> <p>838. The same subject continued — Requisites of petition.</p> <p>839. At what time a decree may be reheard.</p> | <p>§ 840. The same subject continued — Federal Equity Rule 88.</p> <p>841. Rehearing after appeal.</p> <p>842. The same subject continued.</p> <p>843. Rehearing of decree for costs.</p> <p>844. Rehearing of consent decrees.</p> <p>845. Petition for rehearing, to whom made.</p> <p>846. Application for rehearing by a stranger.</p> <p>847. Formal requisites of petition — Order — Notice.</p> <p>848. Proceedings upon rehearing.</p> <p>849. Supplemental bills in the nature of bills of review.</p> |
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§ 831. Enrolment of decrees — Correction of clerical errors.— According to the usual course of chancery practice in the courts of this country, State and federal, an original decree is to be deemed recorded and enrolled as of the term in which the final decree was passed.<sup>1</sup> All judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces

<sup>1</sup> *Whiting v. Bank of United States*, 18 Pet. 6; *Robinson v. Rudkins*, 28 Fed. Rep. 8; *Thompson v. Goulding*, 5 Allen, 82; *Clapp v. Thaxter*, 7 Gray, 386; *Burch v. Scott*, 1 Gill & J. 398; *Pfoltz v. Pfoltz*, 1 Md. Ch. Dec. 455; *Newland v. Glenn*, 2 Md. Ch. Dec. 868; *Sagory v. Bayless*, 18 Sm. & M. 158; *McMicken v. Perin*, 18 How. 507; *Dexter v. Arnold*, 5 Mason, 308; *Simms v. Thompson*, 1 Dev. Ch. 197; *Allen v. Barksdale*, 1 Head (Tenn.), 288; *Husley v. Robinson*, 16 Ala. 798; *La Grange &c. R.*

*Co. v. Rainey*, 7 Cold. (Tenn.) 420, 480. See, also, *Pitman v. Thornton*, 65 Ma. 95, 99. In Michigan it is not until the papers are attached together, and the required certificate of the register under the seal of the court annexed and filed in his office, as prescribed by Howell's Statutes of Michigan, sections 6648, 6649, that the decree and proceedings are deemed to be enrolled. *Low v. Kalamazoo Circuit Judge* (*Low v. Mills*), 61 Mich. 35.

them during the term at which they are rendered or entered of record, and may then be set aside, vacated, modified or annulled by that court.<sup>1</sup> "Errors in judgments or decrees are divided into errors clerical and errors judicial. The former may be amended, even after term, provided the existence of such error is shown by the record."<sup>2</sup> Errors judicial can only be amended upon rehearing or appeal."<sup>3</sup> In Massachusetts,

<sup>1</sup> *Bronson v. Schulten*, 104 U. S. 410; *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 26; *Ex parte Lange*, 18 Wall. 163; *Phillips v. Ordway*, 101 U. S. 745. A formal order and decree may be varied at any time before the entry of the final decree. *Park v. Johnson*, 7 Allen, 378. A court has a right, upon motion, to set aside its decree dismissing a bill at the same term in which it was rendered on discovering an error or that the consent of the complainants to the dismissal was obtained by fraud. *Doss v. Tyack*, 14 How. 298.

<sup>2</sup> See *Hovey v. McDonald*, 109 U. S. 150; *Witters v. Sowles*, 32 Fed. Rep. 180; *Elizabeth v. American & Co.*, 97 U. S. 79. A decree may be corrected or amended on motion or petition as to mere clerical errors, or by the insertion of any provision or direction which would have been inserted as a matter of course if the same had been asked for at the hearing as a necessary or proper clause to carry into effect the decision of the court. And where the further direction asked for is merely consequential upon the decree itself, the proper course is to supply the omission by a distinct order without altering the decree. *Clark v. Hall*, 7 Paige, 383; *Lawrence v. Cornell*, 4 Johns. Ch. 545. If any error has occurred or anything material has been omitted in a decree, which it is not perfectly a matter of course to correct or insert, then a rehearing should be asked. *Gardner v. Dering*,

2 Edw. Ch. 131. In *Jones v. Davenport*, 45 N. J. Eq. 77, 83, upon an application for leave to amend a bill and enter a new final decree, the court said:—"The rule respecting the amendment of decrees, as it has been enforced by this court, may be stated as follows:—The court will not vary or alter an enrolled decree, in a material point, without a bill of review or a new hearing, but it will amend its enrolled decree, even in a material respect, on petition, whenever amendment is necessary to give full expression to the judgment of the court, and the amendment is such as the court would have made when the decree was entered, if it had been asked for." *Dorsheimer v. Rorbach*, 24 N. J. Eq. 83; *Jarman v. Wiswall*, 24 N. J. Eq. 63.

<sup>3</sup> *Hop Bitters Mfg. Co. v. Warner*, 28 Fed. Rep. 577, 578. A federal equity rule provides that "clerical errors in decrees or decretal orders, or errors arising from any accidental slip or omission, may at any time before an actual enrolment thereof be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing." Equity Rule 85. See *Rogers v. Reissner*, 34 Fed. Rep. 270; *Union Sugar Refinery v. Mathiesson*, 8 Cliff. 146; *Burdsall v. Curran*, 31 Fed. Rep. 918; *Albany v. Steam Trap Co.*, 26 Fed. Rep. 318; *Gage v. Kellogg*, 26 Fed. Rep. 242; *Tufts v. Tufts*, 3 W. & M. 429; *Witters v. Sowles*, 32 Fed. Rep. 765.

after a decree has been entered and become a matter of record, there can be no rehearing on motion or petition for the purpose of correcting an alleged error which involves the merits of the case. The remedy is by bill of review.<sup>1</sup>

**§ 832. Correction of decrees by rehearing — Generally.—**

A rehearing, strictly speaking, is a new hearing and a new consideration of the case by the court in which the suit was originally heard and upon the pleadings and depositions already in the case.<sup>2</sup> Under chancery practice unaffected by statute, an interlocutory decree may be set aside in some cases on mere motion; in others by petition for rehearing — the distinction between cases where it can be done by motion and where it must be by petition not being clearly defined.<sup>3</sup> The general rule is not to vary or alter a decree in a material part on motion or petition without a rehearing.<sup>4</sup> Though an order dissolving an injunction may perhaps be discharged by motion or petition on proper grounds, yet the most regular course is to discuss the merits of the order upon a rehearing.<sup>5</sup>

<sup>1</sup> *Thompson v. Goulding*, 5 Allen, 81.

<sup>2</sup> *Read v. Patterson*, 44 N. J. Eq. 211, 218. A rehearing must be based upon grounds existing at the time the decree was pronounced and not upon circumstances arising subsequent to its entry. *Bowyer v. Bright*, 13 Price, 316; *Hurlburd v. Freelove*, 3 Wis. 587.

<sup>3</sup> *Fowler v. Lewis' Adm'r* (West Va.), 14 S. E. Rep. 447, 452, 453; *Barton's Ch. Pr.* 126. A previous decree may be amended to allow what had not been granted without a rehearing, where the opposite parties consent that the relief sought be substantially allowed. *McKenzie v. Bacon*, 40 La. Ann. 157; s. c., 4 So. Rep. 65.

<sup>4</sup> *Ray v. Connor*, 3 Edw. Ch. 478; *Clark v. Hall*, 7 Paige, 382; *Hendricks v. Robinson*, 2 Johns. Ch. 484. See, also, *Howard v. Moffatt*, 2 Johns. Ch. 205; *Gardner v. Dering*, 2 Edw. Ch. 131; *Hop Bitters Mfg. Co. v.*

*Warner*, 28 Fed. Rep. 577, 578. If a decree is not obviously wrong and a clear mistake of the chancellor or the counsel in drawing it up, it can only be corrected on a rehearing. *Rogers v. Rogers*, 1 Paige, 188, 189. "The appropriate mode of applying for a rehearing of an interlocutory decree, rendered on the merits to enable a party to introduce additional evidence, is by petition." *Trevelyan's Adm'r v. Lofft*, 83 Va. 141, 145. In *Hyman v. Smith*, 10 West Va., 298, it was held that an interlocutory decree may be reversed without a bill in the nature of a bill of review if there is sufficient matter to reverse it on the face of the record; but that the new investigation is usually brought on by petition for rehearing when there is no defect to be supplied. See, also, *Banks v. Anderson*, 2 Hen. & M. 20.

<sup>5</sup> *Van Bergen v. Demarest*, 4 Johns. Ch. 35.

§ 833. **Rehearings discretionary.**—A rehearing in equity rests in the discretion of the court,<sup>1</sup> and is not a subject of appeal.<sup>2</sup> It is not a matter of right except in the cases provided for by the rules of the court.<sup>3</sup> In England the granting of a rehearing is much a matter of course upon a certificate signed by two counsel;<sup>4</sup> but in this country it is not a matter of course even on the usual certificate of counsel.<sup>5</sup> It seems that where there is error on the face of an interlocutory decree a petition for a rehearing will be treated as a bill of review and allowed as of course.<sup>6</sup> A rehearing in equity will be granted by the court in its discretion, if it thinks the case ought to be reheard, even when the error alleged was simply error of law.<sup>7</sup>

§ 834. **The same subject continued — Considerations governing discretion.**—In a case in the United States circuit court Mr. Justice Field tersely says that a re-argument is never granted to allow a rehash of old arguments, and that the proper remedy for errors of the court on points argued

<sup>1</sup> *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 14 N. J. Eq. 308; *Brumagim v. Chew*, 19 N. J. Eq. 337; *Travis v. Waters*, 1 Johns. Ch. 48; *Railway Register Co. v. North Hudson &c. R. Co.*, 26 Fed. Rep. 411; *Buffington v. Harvey*, 95 U. S. 99; *Johnson v. Tucker*, 2 Tenn. Ch. 244; *Welsh v. Solenberger*, 85 Va. 441; s. c., 8 S. E. Rep. 91, 98; *Daniell v. Mitchell*, 1 Story, 198; *Field v. Schieffelin*, 7 Johns. Ch. 48; *Steines v. Franklin County*, 14 Wall. 15; *Barnes v. Grove* (Mich.), 56 N. W. Rep. 599. After a report of a committee and an amendment of the bill, the granting of a rehearing of the cause in whole or in part is a matter within the discretion of the court and not subject to review on appeal. *Hoyt v. Smith*, 28 Conn. 487.

<sup>2</sup> *Read v. Patterson*, 44 N. J. Eq. 211, 218; *Roemer v. Bernheim*, 182 U. S. 108, 106; *Buffington v. Harvey*, 95 U. S. 99, 100; *Steines v. Franklin County*, 14 Wall. 15, 22; *Boesch v. Graff*, 183 U. S. 697, 699; *Galloway v. Dunning-*

*ton*, 10 Lea, 216, 218. See, also, *Barnes v. Grove* (Mich.), 56 N. W. Rep. 599, a dismissal of an appeal from an order granting a rehearing. Cf. *Kelley v. McKinney*, 5 Lea, 164, 169.

<sup>3</sup> *Land v. Wickham*, 1 Paige, 256.

<sup>4</sup> *Cunyngham v. Cunyngham*, Amb. 91; *East India Co. v. Boddam*, 13 Ves. 428; *Attorney-General v. Brooke*, 18 Ves. 325. See, also, *Wilcox v. Wilcox*, 1 Ired. Ch. 86; *Cotton v. Parker*, 1 Sm. & M. Ch. 125.

<sup>5</sup> *Decarters v. La Farge*, 1 Paige, 574; *Brumagim v. Chew*, 19 N. J. Eq. 337, 338; *Jenkins v. Eldredge*, 3 Story, 299, 804; *Emerson v. Davies*, 1 Wood. & M. 21; *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 14 N. J. Eq. 308; *Land v. Wickham*, 1 Paige, 256.

<sup>6</sup> *Knox v. Columbia Liberty Iron Co.*, 42 Fed. Rep. 378.

<sup>7</sup> *Hodges v. Screw Co.*, 3 R. L. 9; *Shepherd v. Taylor* (R. I.), 18 Atl. Rep. 105, where it was said that the discretion should be exercised liberally in favor of a rehearing.

in the first hearing is to be sought by appeal when the decree is one which can be reviewed by an appellate tribunal.<sup>1</sup> When the ground on which the petition for a rehearing rests does not affect the merits of the controversy, nor is a matter by which the petitioners are or can be aggrieved, and when its only effect would be, if maintained, not to decide the matter in controversy, but to turn the complainants out of court as improper parties, leaving the controversy undecided, the application will be denied.<sup>2</sup>

§ 835. Rules regulating discretion continued.—Mistake or error of judgment of counsel is no ground for rehearing.<sup>3</sup> If a motion for rehearing is made for delay it will be refused.<sup>4</sup> A rehearing will not be granted because the court in its opinion misquoted the testimony, where such misquotation does not change the opinion.<sup>5</sup> Where a party acts under a decree, it is a strong circumstance against granting him a rehearing.<sup>6</sup> An application for a rehearing must be denied where it is based solely on evidence already before the court and passed

<sup>1</sup> *Giant Powder Co. v. California Co.*, 5 Fed. Rep. 197, quoted in *Railway Register Mfg. Co. v. North Hudson &c. R. Co.*, 26 Fed. Rep. 411, 412. In denying a motion for a rehearing Chancellor Kentsaid:—"If the chancellor is satisfied that the cause has been exhausted by argument, and if he has given to the case the best examination in his power, and has arrived at a conclusion which satisfies his judgment, I see no propriety nor use nor justice in granting a rehearing." *Field v. Schieffelin*, 7 Johns. Ch. 250, 256. See *Travis v. Waters*, 1 Johns. Ch. 48, 49. Except when the judge acts of his own motion, rehearings are granted "only upon such grounds as would authorize a new trial in an action at law;" that is, for newly-discovered evidence or errors of law apparent upon the record. Per Justice Field in *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. Rep. 197, 201.

<sup>2</sup> *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 14 N. J. Eq. 809.

<sup>3</sup> *McDowell v. Perrine*, 36 N. J. Eq. 682 (distinguishing *Day v. Allaire*, 4 Stew. Eq. 308); *Hall v. Southard*, 2 Chitty, 267; *Queen v. Helston*, 10 Mod. 202; *Jones v. Pilcher*, 6 Munf. 425, a strong case; *Franklin v. Wilkinson*, 3 Munf. 112; *Baker v. Whiting*, 1 Story, 218; *Gorgerat v. McCarty*, 1 Yeates, 94; *Perrine v. White*, 36 N. J. Eq. 3, and note; *Warner v. Warner*, 31 N. J. Eq. 549; *Patterson v. Read*, 43 N. J. Eq. 18; *Witters v. Sowles*, 31 Fed. Rep. 5. Cf. *Hulsizer's Adm'r's v. Opdyke* (N. J. Ch.), 14 Atl. Rep. 644.

<sup>4</sup> *Land v. Wickham*, 1 Paige, 256. In *Norton v. Walsh*, 49 Fed. Rep. 769, a motion for rehearing upon newly-discovered evidence was denied on the ground of gross laches.

<sup>5</sup> *Torrent v. Duluth Lumber Co.*, 33 Fed. Rep. 239.

<sup>6</sup> *Coster v. Clarke*, 3 Edw. Ch. 405.

upon adversely to the applicant on rehearing before another judge, and no manifest error is shown.<sup>1</sup>

§ 836. **Rehearing for new evidence.**—According to strict chancery practice a rehearing is had only upon the pleadings and depositions already in the case.<sup>2</sup> But the court has the power to extend the permission to other testimony in a proper case.<sup>3</sup> A rehearing after final decree is never granted to enable a party to present cumulative testimony,<sup>4</sup> or to contradict the witnesses examined by the adverse party,<sup>5</sup> or where the party applying has been guilty of gross laches.<sup>6</sup>

§ 837. **The same subject continued.**—Under the present practice in the New Jersey court of chancery regulating the trial of cases orally before a vice-chancellor, a motion for a rehearing, in order to introduce further proofs, is a motion

<sup>1</sup> *Rogers v. Reissner*, 84 Fed. Rep. 270.

<sup>2</sup> *Read v. Patterson*, 44 N. J. Eq. 211, 218; *Hoffman's Ch. Pr.* (2d ed.) 567.

<sup>3</sup> *Hoffman's Ch. Pr.* (2d ed.) 567.

"A rehearing is proper for reconsidering testimony or correcting improper conclusions of law, to be usually had at the same term. So, too, the court may rehear the cause for the purpose of receiving new evidence in a proper case. *Scales v. Nichols*, 2 Yerg. (Tenn.) 140; *Robertson v. Maclin*, 4 Hayw. 253. But it is obvious that a rehearing for the latter purpose must be confined within rigid limits and carefully guarded, not merely because it tends to protract litigation uselessly, . . . but it opens the door to fraud and perjury. The unsuccessful litigant, finding where the shoe pinches, is exposed to a temptation often too great for the weakness of human nature. Parties ought not, as a general rule, to be allowed to go into further proofs, but confined upon a rehearing to the testimony used or which might have been used on the former hearing, unless, as in a bill of review,

new evidence may be disclosed which could not possibly have been used before. Evidence although newly discovered will not suffice where the negligence of the party was the cause of its not being sooner discovered or where it is merely cumulative. *Young v. Henderson*, 4 Hayw. 189. The evidence ought to be material if not controlling. *Burson v. Dosser*, 1 Heisk. 754." *Kelley v. McKinney*, 5 Lea, 164, 169, where an order granting a rehearing with leave to take new proof was reversed on appeal.

<sup>4</sup> *Dunham v. Winans*, 2 Paige, 24; *McDowell v. Perrine*, 36 N. J. Eq. 632; *Pfanschmidt v. Kelly Mercantile Co.*, 32 Fed. Rep. 667; *Dennett v. Dennett*, 44 N. H. 531; *Baker v. Whitney*, 1 Story, 218; *Livingston v. Hubbs*, 8 Johns. Ch. 124; *Witters v. Sowles*, 32 Fed. Rep. 765.

<sup>5</sup> *Dunham v. Winans*, 2 Paige, 24.

<sup>6</sup> *Norton v. Walsh*, 49 Fed. Rep. 769; *Albany Steam-Trap Co. v. Felt-housen*, 26 Fed. Rep. 818; *Corey v. Moore*, 86 Va. 721; s. c., 11 S. E. Rep. 114. See, also, *Witters v. Sowles*, 31 Fed. Rep. 5.

for a new trial, and is governed by the same rules that the law courts apply to applications for new trials.<sup>1</sup> In such case the party applying must offer evidence not only new in the sense that it is not simply cumulative, but it must also be newly discovered, and such as he could not have known and produced on the trial by the exercise of diligence.<sup>2</sup>

§ 838. The same subject continued — Requisites of petition.— The rule governing applications to rehear decrees in chancery upon matter of fact is that the petition for rehearing must set forth the discovery of new evidence, and must be supported by affidavit that such after-discovered evidence could not have been brought forward by the use of reasonable diligence before the decree was made.<sup>3</sup> Nor is it sufficient to allege merely that the party applying expects to prove certain facts; but the newly-discovered evidence must be substantially and distinctly stated in order that the court may judge of its relevancy and materiality; and it must not be merely cumulative, but such as would probably have produced a different result had it been offered in time.<sup>4</sup>

§ 839. At what time a decree may be reheard.— The English practice made enrolment the termination of the period within which a rehearing could be granted.<sup>5</sup> Until that time the decree was not considered a record of the court and could be altered upon a rehearing.<sup>6</sup> The modern equivalent of the old rule is that a final decree cannot be reheard on petition after the term has ended,<sup>7</sup> unless by virtue of statutory provisions or rules of court.<sup>8</sup>

<sup>1</sup> Warner v. Warner, 81 N. J. Eq. 549; Burrows v. Wene (N. J. Ch.), 26 Atl. Rep. 890.

<sup>2</sup> Burrows v. Wene (N. J. Ch.), 26 Atl. Rep. 890; McDowell v. Perrine, 86 N. J. Eq. 632; Main v. Main (N. J. Ch.), 25 Atl. Rep. 372.

<sup>3</sup> Armstead v. Bailey, 88 Va. 242.

<sup>4</sup> Carter v. Allan, 21 Gratt. 241; Whitten v. Saunders, 75 Va. 563; Trevelyan's Adm'r v. Lofft, 88 Va. 141; Armstead v. Bailey, 88 Va. 242.

<sup>5</sup> 2 Daniell's Ch. Pr. (5th ed.) 1475. The same rule appears to have prevailed in the New York court of chancery. 2 Barbour's Ch. Pr. 352.

<sup>6</sup> 1 Daniell's Ch. Pr. (5th ed.) 1475, 1019.

<sup>7</sup> Hodges v. Davis, 4 Hen. & M. 400; Parker v. Logan (Va.), 4 S. E. Rep. 618; Roanoke Nat. Bank v. Farmers' Nat. Bank (Va.), 5 S. E. Rep. 632; Harvey v. Branson, 1 Leigh, 108; Orndoff v. Turner, 2 Leigh, 209; Brooks v.

<sup>8</sup> 2 Daniell's Ch. Pr. (5th ed.) 1476. note. See Owens v. Forbes, 9 Fla. 325.



§ 840. The same subject continued — Federal equity rule 88.— A federal equity rule provides that “no rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.”<sup>1</sup> A decree fixing the priority of claims against an insolvent corporation and directing the sale of its property for their demands is a final decree within the foregoing rule.<sup>2</sup> Where a motion is made for leave to file a petition for a rehearing, and the allegations of the insufficiency of the amount involved to allow an appeal are conceded as true by the opposite party, the motion is properly granted, and such party cannot be allowed to show afterwards that the amount involved was sufficient to allow an appeal.<sup>3</sup> An order sustaining a petition for a rehearing after the lapse of the term next succeeding the entry of a final decree is utterly void<sup>4</sup> and cannot be validated by any action of the defendant in taking leave to plead, etc.<sup>5</sup>

*Burlington &c. Ry. Co.*, 103 U. S. 107; *Public Schools v. Walker*, 9 Wall. 608; *Hudson v. Christie*, 7 Cranch, 1; *Brown v. Aspen*, 14 How. 25; *United States v. Knight*, 1 Black (U. S.), 488; *Cambuston v. United States*, 95 U. S. 285; *Roemer v. Simon*, 91 U. S. 149; *Robertson v. Maclin*, 4 Hayw. 53. A court has the power to pass upon and allow a motion made and entered at the preceding term to vacate a decree of that term, which went over as unfinished business. *Phillips v. Ordway*, 101 U. S. 745; *Niles v. Parks* (Ohio), 84 N. E. Rep. 785. A formal recorded adjournment may be vacated if within the lawful term. Per Woods, J., *obiter*, in *Hack v. Chicago &c. Ry. Co.*, 23 Fed. Rep. 356, 358.

<sup>1</sup> Equity Rule 88. There is a conflict of opinion as to whether a rehearing may be granted outside of the time fixed in the rule where the petition was filed within the time

*Cf. Glenn v. Noonan*, 48 Fed. Rep. 498, with *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. Rep. 197, 202.

<sup>2</sup> *Hoffman v. Knox* (C. C. A.), 50 Fed. Rep. 489, reversing *Knox v. Columbia Liberty Iron Co.*, 42 Fed. Rep. 378. For the purposes of a rehearing under the rule, a decree from which no appeal can be taken is deemed to be a final decree. *Easton v. Houston &c. Ry. Co.*, 44 Fed. Rep. 7, 9.

<sup>3</sup> *Moelle v. Sherwood*, 148 U. S. 21; s. c., 18 S. Ct. Rep. 426.

<sup>4</sup> *Glenn v. Dimmock*, 48 Fed. Rep. 550; *Sheffey v. Bank of Lewisburg*, 88 Fed. Rep. 315; s. c., affirmed, *Lewisburg Bank v. Sheffey*, 140 U. S. 445; s. c., 11 S. Ct. Rep. 745; *Easton v. Houston &c. Ry. Co.*, 44 Fed. Rep. 7.

<sup>5</sup> *Glenn v. Dimmock*, 48 Fed. Rep. 550.

§ 841. **Rehearing after appeal.**—The chancellor has no power to rehear or modify an order or decree which has been affirmed upon an appeal upon the same point as to which the rehearing or modification is sought, unless such right to alter or modify was reserved in the original order or decree, or in the decree of affirmance.<sup>1</sup>

§ 842. **The same subject continued.**—In the federal courts parties who desire a rehearing of a case after it has been taken to the Supreme Court on appeal, while the term from which the appeal was allowed is still in session, can only apply to the court below, and that court may send up a request for a return of the record, which the Supreme Court will grant in a proper case, and under proper restrictions.<sup>2</sup>

§ 843. **Rehearing of decree for costs.**—A rehearing will not be granted on a decree for costs only,<sup>3</sup> except under special circumstances.<sup>4</sup> After the entry of a final decree which embraces and definitively settles the whole case, the court will not entertain a motion at a subsequent term for a rehearing upon the question of costs, respecting which no motion or suggestion was made while the case was before the court.<sup>5</sup>

§ 844. **Rehearing of consent decrees.**—There can be no rehearing of a decree made by consent of counsel,<sup>6</sup> not even, it has been said, where the decree was made without the party's consent;<sup>7</sup> and a rehearing is properly denied as to a party who appears to have known what the decree was, and who was not induced to agree to the same by any misrepresentations.<sup>8</sup>

§ 845. **Petition for rehearing, to whom made.**—According to the former practice in the English chancery, a rehearing was had either before the same judge who presided at the original hearing or before the Lord Chancellor.<sup>9</sup> In the federal courts the petition is usually presented to the judge who

<sup>1</sup> *Lyon v. Merritt*, 6 Paige, 473.

<sup>2</sup> *Roemer v. Simon*, 91 U. S. 149.

<sup>3</sup> *Eastburne v. Kirk*, 2 Johns. Ch. 817.

<sup>4</sup> *Travis v. Waters*, 1 Johns. Ch. 48.

<sup>5</sup> *Bradlee v. Appleton*, 2 Allen, 98.

<sup>6</sup> *Coster v. Clarke*, 8 Edw. Ch. 405.

<sup>7</sup> *Perrine v. White*, 86 N. J. Eq. 2,

and cases cited.

<sup>8</sup> *Hodges v. McDuff*, 76 Mich. 308.

<sup>9</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1471.

heard the cause.<sup>1</sup> In New Jersey an application for the rehearing of a decree advised by the vice-chancellor should ordinarily be made to the vice-chancellor who advised the decree, and if he advise a rehearing he should rehear it himself, and such applications should be made to and entertained by the chancellor only in exceptional cases.<sup>2</sup>

§ 846. *Application for rehearing by a stranger.*—A person not a party to a suit is not entitled as of course to file a petition for rehearing, even though he may have an interest in the suit. His proper proceeding is to file a petition for leave to file a petition for rehearing.<sup>3</sup> A rehearing does not lie for assignees.<sup>4</sup>

§ 847. *Formal requisites of petition — Order — Notice.*—A petition for rehearing ought to state the grounds upon which relief is sought.<sup>5</sup> A federal equity rule provides that “every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by oath of the party or by some other person.”<sup>6</sup> If the application is based upon evidence of new facts not in issue the petition should be accom-

<sup>1</sup> *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. Rep. 202.

<sup>2</sup> *Rusling v. Bray*, 88 N. J. Eq. 398.

<sup>3</sup> *In re Doyle*, 14 R. L. 55, citing *Paterson v. Scott*, cited in *Seton on Decrees* (8d ed.), 1154; *Gwynne v. Edwards*, 9 Beav. 22, 34; *Perry v. Attorney-General*, 2 Mac. & G. 16, 17, 18; *Jopp v. Wood*, 38 Beav. 372; *Parmiter v. Parmiter*, 8 De G., F. & J. 461; 1 *Barton's Ch. Pr.* 205. See, also, *Boykin v. Kernochan*, 24 Ala. 697.

<sup>4</sup> *Armstead v. Bailey*, 33 Va. 242, 245; 1 *Barton's Ch. Pr.*, where the author says that it is nevertheless competent to a person not a party to the former suit, but whose interest may in some way have been affected by the proceedings had therein, to come in by petition to be made a

party, and then ask a rehearing of a former decree.

<sup>5</sup> *Wiser v. Blachly*, 2 Johns. Ch. 488. An irregular petition may be taken off the files upon motion. *Wood v. Griffith*, 1 Mer. 35. An application for rehearing on motion and affidavit is entirely irregular. *Frazier v. Tubb*, 2 Heisk. 663; *Taylor v. Boyd*, 6 Heisk. 611; *Galloway v. Dunnington*, 10 Lea, 216, 218. An application will not be treated as one for a rehearing unless it is apparently so and made in due form and according to the settled practice of the court. *Gardner v. Dering* (1833), 2 Edw. Ch. 181. But see *Staples' Ex'rs v. Staples*, 35 Va. 76; s. c., 7 S. E. Rep. 199.

<sup>6</sup> Equity Rule 88. The affidavit must be positive. *Page v. Holmes*

panied by a supplemental bill in the nature of a bill of review, setting up those facts, in which case the bill may be heard at the same time the rehearing is had.<sup>1</sup> The course of procedure is for the party to file his petition with the clerk and obtain from the court an order upon the opposite party to show cause why his prayer should not be granted.<sup>2</sup> The adverse party may then answer the petition, and upon the petition and answer the application can be heard.<sup>3</sup> Notice of the petition must be given to the opposite party.<sup>4</sup>

§ 848. *Proceedings upon rehearing.*—A rehearing is a new hearing upon the pleadings and depositions already in the case.<sup>5</sup> Whatever evidence has been taken in the case may be read at the rehearing, although it has not been read at the hearing;<sup>6</sup> but no new evidence can be admitted except of exhibits discovered since the hearing or testimony to the incompetency of a witness.<sup>7</sup> On a rehearing the cause is open to the party who petitions for the rehearing only as to those parts of the decree complained of in the petition; but as to the other party the cause is open as to the whole matter.<sup>8</sup> An objection of substance, going against the entire right of the complainants to sue, from their having no interest in the matters in controversy, may be raised for the first time upon

Burglar Alarm Tel. Co., 2 Fed. Rep. 830.

<sup>1</sup> *Baker v. Whiting*, 1 Story, 218; *Perry v. Phelps*, 17 Vea. 173, 178; *Jopp v. Wood*, 2 De G., J. & S. 823.

<sup>2</sup> *Giant Powder Co. v. Cal. Vigorit Powder Co.*, 5 Fed. Rep. 197, 201.

<sup>3</sup> *Giant Powder Co. v. Cal. Vigorit Powder Co.*, 5 Fed. Rep. 197, 201.

<sup>4</sup> *Giant Powder Co. v. Cal. Vigorit Powder Co.*, 5 Fed. Rep. 197, 202.

<sup>5</sup> *Read v. Patterson*, 44 N. J. Eq. 211, 218. See § 832, *supra*.

<sup>6</sup> *Hoffman's Ch. Pr.* (3d ed.) 566: *Dale v. Roosevelt*, 6 Johns. Ch. 256, and cases cited. The plaintiff may withdraw from evidence any portion of the answer read at the original hearing. *Allfrey v. Allfrey*, 1 Macn. & G. 87; *Ogle v. Morgan*, 1 De G., M. & G. 359.

<sup>7</sup> *Hoffman's Ch. Pr.* (3d ed.) 566; *Dale v. Roosevelt*, 6 Johns. Ch. 256; *Higgins v. Mills*, 5 Russ. 287; *Needham v. Smith*, 2 Vern. 463. See § 550, *supra*. A voluntary *ex parte* affidavit of a witness to explain and correct a mistake in his former testimony cannot be read at a rehearing of the cause. *Gray v. Murray*, 4 Johns. Ch. 412.

<sup>8</sup> *Consequa v. Fanning*, 3 Johns. Ch. 587; *Ferguson v. Kimball*, 3 Barb. Ch. 616; *Dale v. Roosevelt*, 6 Johns. Ch. 255. But on a petition and order for rehearing generally, the whole case is open, and the party supposing himself aggrieved has a right to insist on a reconsideration of any part of it. *Glover v. Hedges*, 1 N. J. Eq. 183.

a rehearing.<sup>1</sup> The party who complains of the decree and seeks to have it corrected is entitled to open and close the argument.<sup>2</sup> A second petition for a rehearing can be filed only by leave of the court.<sup>3</sup>

§ 849. **Supplemental bills in the nature of bills of review.**—Where a party seeks to reverse or modify a decree by reason of new matter, discovered since publication in the original cause, such new matter should be brought forward by a supplemental bill in the nature of a bill of review.<sup>4</sup> Such a bill is necessary where a different kind of relief is sought, or a different principle from that on which the original decree was given.<sup>5</sup> It can be filed only by leave of court, obtained in the same manner and upon the same grounds as leave to file a bill of review,<sup>6</sup> and must be filed within a reasonable time after the discovery of the new matter.<sup>7</sup> It should be accompanied by a petition for a rehearing,<sup>8</sup> and pray that the cause may be reheard with respect to the new matter at the same time that it is reheard upon the original bill.<sup>9</sup> It should also state the circumstances positively which entitle the party to file it, viz.: that the decree has not been enrolled, and not merely state them in the alternative, praying one sort of relief, as upon a bill of review, if the decree has been enrolled, and if not enrolled then to have the benefit of it, as upon a supplemental bill in the nature of a bill of review.<sup>10</sup> It should be signed by counsel, and the proceedings upon it are substantially the same as upon bills of review.<sup>11</sup>

<sup>1</sup> *Harrison v. M'Mennomy*, 2 Edw. Ch. 251.

<sup>2</sup> *Sills v. Brown*, 1 Johns. Ch. 444.

<sup>3</sup> *Moss v. Baldock*, 1 Phill. 118.

<sup>4</sup> *Story's Equity Pleading* (10th ed.), § 422. Matter of revivor and supplement may be incorporated into such a bill. *Perry v. Phelps*, 17 Ves. 176-178.

<sup>5</sup> *Story's Equity Pleading* (10th ed.), § 422. See *Turner v. Tepper*, 46 L. J. Ch. 708; Note to *Brewer v. Bowman* (8 J. J. Marsh. 492), in 20 Am. Dec. 158.

<sup>6</sup> *Story's Equity Pleading* (10th ed.), § 422. See § 868, *infra*.

<sup>7</sup> *Story's Equity Pleading*, § 423. As to a deposit as security for costs, see § 871, *infra*.

<sup>8</sup> *Moore v. Moore*, 2 Ves. Jr. 596; *Perry v. Phelps*, 17 Ves. 178.

<sup>9</sup> *Story's Equity Pleading* (10th ed.), § 425.

<sup>10</sup> *Story's Equity Pleading* (10th ed.), § 425.

<sup>11</sup> *Story's Equity Pleading*, §§ 422-425. Bills of review are discussed in the following chapter.

## CHAPTER XXVI.

### CORRECTION OF DECREES AFTER ENROLMENT.

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| <p>§ 850. Mode of correcting enrolled decrees generally.</p> <p>851. Correction of errors by petition.</p> <p>852. Bills of review—(a) Definition and classification.</p> <p>853. (b) Consent decrees.</p> <p>854. (c) Errors of fact.</p> <p>855. (d) After judgment on appeal.</p> <p>856. (e) The same subject continued—The New Jersey rule.</p> <p>857. (f) Error apparent.</p> <p>858. (g) Errors apparent illustrated.</p> <p>859. (h) The same subject continued.</p> <p>860. (i) Matter of fact—What constitutes available new matter.</p> <p>861. (j) The same subject continued—Illustrations.</p> <p>862. (k) The same subject continued—Complainant's laches.</p> <p>863. (l) Jurisdiction.</p> <p>864. (m) Limitation of time for filing.</p> <p>865. (n) The same subject continued—Computation of time.</p> <p>866. (o) Leave to file—When necessary.</p> | <p>§ 867. (p) The same subject continued—Leave discretionary—Review of discretion.</p> <p>868. (q) Application for leave.</p> <p>869. (r) Performance of decree as a condition precedent.</p> <p>870. (s) The same subject continued.</p> <p>871. (t) Security for costs.</p> <p>872. (u) Who may file.</p> <p>873. (v) Parties.</p> <p>874. (w) Frame of bill.</p> <p>875. (x) The same subject continued.</p> <p>876. (y) Defenses to bills for errors apparent.</p> <p>877. (z) Defenses to bills for new matter.</p> <p>878. (aa) Restitution of costs upon sustaining bill.</p> <p>879. Vacating decrees for surprise or irregularity.</p> <p>880. The same subject continued.</p> <p>881. Bills in the nature of bills of review.</p> <p>882. Supplemental bill in the nature of a bill of review.</p> <p>883. Impeachment of decrees by infants.</p> <p>884. Original bills to impeach decrees for fraud.</p> |
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§ 850. Mode of correcting enrolled decrees generally.—The general power of the court over its own judgments, orders and decrees during the existence of the term at which they are first made is undeniable.<sup>1</sup> It has been declared in

<sup>1</sup> *Ex parte Lange*, 18 Wall. 168; 217; *Henderson v. Carbondale Coal Phillips v. Ordway*, 101 U. S. 745; & *Coke Co.*, 140 U. S. 26; § 881, *su-Thruston v. Deveemon*, 80 Md. 210, *pra.* Where a judgment or decree

the federal courts that "No principle is better settled or of more universal application than that no court can reverse or annul its own final decrees or judgments for errors of fact or law after the term at which they have been rendered unless for clerical mistakes."<sup>1</sup> The power of the court over the action and over the parties to it is exhausted by the final adjournment of the term at which the final decree is entered, and it cannot resume jurisdiction either over the subject-matter or the parties without a new proceeding, and the service therein of the ordinary original process.<sup>2</sup> In *Maryland* the rule was stated that after a decree has been enrolled<sup>3</sup> it must be allowed to stand for what it purports to be on its face, until revised or reversed in a more solemn and formal manner than can be done on petition;<sup>4</sup> and that the only proper modes recognized by law for reversing or annulling a decree or decretal order, after enrolment, in the absence of

is set aside at the term at which it is rendered, it is as though it had never been. *Henderson v. Carbondale Coal & Coke Co.*, *supra*.

<sup>1</sup> *Sibbald v. United States*, 12 Pet. 488. Decrees are usually deemed enrolled as of the term when they are rendered. § 881, *supra*.

<sup>2</sup> *Pope Mfg. Co. v. Warwick Cycle Mfg. Co.*, 50 Fed. Rep. 819, 830; *Cameron v. McRoberts*, 8 Wheat. 591; *Bank v. Moes*, 6 How. 81; *Assignees v. Dorsey*, 2 Wash. C. C. 488; *Sibbald v. United States*, 12 Pet. 488; *Becker v. Sauter*, 89 Ill. 596; *Jackson v. Ashton*, 10 Pet. 480; *Campbell v. Jones*, 81 Fed. Rep. 525; *Hop Bitters Mfg. Co. v. Warner*, 28 Fed. Rep. 577, 578; *Noonan v. Bradley*, 12 Wall. 121; *McMicken v. Perin*, 18 How. 507; *Dexter v. Arnold*, 5 Mason, 308; *Jenkins v. Eldredge*, 1 Wood. & M. 61. The statement in the text is not strictly accurate except in respect of decrees in the federal courts. In some of the States decrees may be vacated on petition even after the term has ended. See §§ 879, 880, *infra*. With that exception the rule

is of general application. *Garlington v. Copeland* (S. C.), 10 S. E. Rep. 616; *Staples v. Hardeman* (Ga.), 16 S. E. Rep. 657; *Bennett v. Winter*, 2 Johns. Ch. 205; *Mead v. Arms*, 8 Vt. 148; *Wiser v. Blackley*, 2 Johns. Ch. 488; *Howard v. Moffatt*, 2 Johns. Ch. 205; *Carpenter v. Muchmore*, 15 N. J. Eq. 123. A federal court has jurisdiction to determine whether a decree rendered by it at a previous term is void. *United States v. Wallace*, 46 Fed. Rep. 569. After the close of the term at which a consent decree was entered it can never be set aside, except upon consent, by any proceedings in the cause, though it was entered by mistake or by the fraud of one of the parties. *Rose v. Brown*, 17 West Va. 649; *Armstrong v. Wilson*, 19 West Va. 108, and *Manion v. Fahy*, 11 West Va. 482, holding that for fraud or mistake an original bill is necessary and proper to annul such consent decree whether the decree be final or interlocutory.

<sup>3</sup> See § 881, *supra*.

<sup>4</sup> *Thruston v. Deveemon*, 80 Md. 210, 217.

surprise or irregularity in obtaining it, are by bill of review for errors apparent on the face of the proceedings, or for some new matter discovered since the order or decree passed, or by original bill for fraud.<sup>1</sup>

§ 851. **Correction of errors by petition.**— When a clerical error has crept into a decree, or some ordinary direction has been omitted, the court will entertain an application to rectify it, even though it has been passed and entered and an appeal has been taken.<sup>2</sup> And it has been held that a material amend-

<sup>1</sup> *Thruston v. Deveemon*, 30 Md. 210, 217; *Tomlinson v. McKaig*, 5 Gill (Md.), 256; *United States Tel. Co. v. Stevens* (Md.), 8 Atl. Rep. 908. In the case first cited the court, after declaring the rule as stated in the text, said:—"The case of *Oliver v. Palmer*, 11 Gill & John. 187, has been relied on as justifying the proceeding by petition. In that case proceedings had taken place under the act of 1890, chapter 161, of an *ex parte* character, and after the decree was enrolled a petition was filed to vacate the enrolment upon the ground of surprise, and asking to be let in to answer the merits. The court of appeals held that the party applying could be relieved on petition. That case, however, belongs to a class forming an exception to the general rule."

<sup>2</sup> *Hovey v. McDonald*, 109 U. S. 150. See, also, *Elizabeth v. American & Co. Co.*, 97 U. S. 79; *Hop Bitters Mfg. Co. v. Warner*, 28 Fed. Rep. 577, 578; *Bank of Rochester v. Emerson*, 10 Paige, 359; § 881, *supra*. In *Mamie v. Graham*, 3 McLean, 41, it was said that after enrolment of a decree an error of calculation might be corrected upon petition or motion. A mere clerical error in a decree is sometimes corrected on motion, after enrolment, but ordinarily the only safe way to correct a mistake is by

bill of review. *Robinson v. Rudkins*, 28 Fed. Rep. 8. See, on this point, *Bramblett v. Pickett*, 2 A. K. Marsh. 11; *Burch v. Scott*, 1 Bland, 120; *Irwin v. Vint*, 6 Munf. 267. An amendment of the record, necessary to enable a case to be taken from the Supreme Court of a State to the Supreme Court of the United States by a writ of error will not be ordered upon a petition filed six months after the final judgment or decree. The court said that fair dealing and justice require that the intention to appeal should be made known to the other party and to the court before the final judgment, in order that proper entries may be made upon the record. *Snell v. Dwight*, 121 Mass. 348. A clerical error, in a consent decree, is a mistake made by the clerk in entering the decree, or it may be a mistake in a calculation, whereby a sum entered in the decree is arrived at, where all the parties are agreed upon the basis of calculation; but where the error consists in the insertion of a particular sum as the result of a calculation on a basis which some of the parties regard as not in accord with the agreement, it is not a clerical error, but a mistake of parties, and, if an error, it can only be corrected by an original bill. *Morris' Adm'r v. Peyton's Adm'r*, 29 West Va. 201.



ment may be made to a decree, even after enrolment, on petition, without a rehearing, where it is one which would have been made as of course if suggested at the hearing.<sup>1</sup> After the term a decree may be so amended, *nunc pro tunc*, as to make it speak the truth.<sup>2</sup> But a decree cannot be changed by a *nunc pro tunc* decree at a subsequent term, where the proposed alteration would create a variance between the original decree and the averments of the bill.<sup>3</sup> Where the court is asked to change its decree so that the decree shall have a different effect from that which the court intended it should, the application will be refused.<sup>4</sup> The rectification of a decree or order is usually made by an alteration of the decree or order itself;<sup>5</sup> but where this cannot conveniently be done, a supplemental order will be made.<sup>6</sup>

<sup>1</sup> *Dorsheimer v. Rorback*, 24 N. J. Eq. 38, by the addition of a clause necessary to affect the remedy of the complainant under it, citing, among other cases, *Eyles v. Ward*, 1 Dick. 58; *Yow v. Townsend*, 1 Dick. 59; *Shine v. Gough*, 2 Ball & B. 33; *Spearing v. Lynn*, 2 Vern. 876; *Lowten v. Corporation of Colchester*, 2 Mer. 395; *Bennett v. Button*, 1 Dick. 185; *Davis v. Morris*, 18 Price, 766; *Gardner v. Dering*, 2 Edw. Ch. 138; *Clark v. Hall*, 7 Paige, 384; *Sprague v. Jones*, 9 Paige, 395. Cf. *Staples v. Hardeman* (Ga.), 16 S. E. Rep. 657. Such an amendment after enrolment cannot be made upon an *ex parte* application. It must be by petition and notice. *Jarmon v. Wiswalt*, 24 N. J. Eq. 68. After court has finally adjourned, and its decree has been filed and become a record of the court, the judge at chambers has no jurisdiction to amend the decree so as to reduce the amount of the defendant's liability. *Garlington v. Copeland* (S. C.), 10 S. E. Rep. 616. Where a party delayed a year and six months in applying to the chancellor to correct a mistake made in drawing up a decree, leave to amend

the decree was refused. *Rogers v. Rogers*, 1 Paige, 188.

<sup>2</sup> *Hershy v. Baer*, 45 Ark. 240, holding that such amendment does not confer additional rights to file exceptions. See further, as to *nunc pro tunc* decrees, § 796 *et seq.*, *supra*.

<sup>3</sup> Thus when a final decree has been rendered, ordering a sale of lands, and describing them by government numbers as stated in the bill, the decree cannot be amended at a subsequent term, *nunc pro tunc*, by correcting a mistake in the numbers, as disclosed by the evidence. *Owen v. Bankhead*, 32 Ala. 399; s. c., 3 So. Rep. 97.

<sup>4</sup> *Jones v. Davenport*, 45 N. J. Eq. 78, 83.

<sup>5</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1030; *Hawker v. Buncombe*, 2 Mad. 391; *Skrymsher v. Northcote*, 1 Swanst. 578, n.; *Tomlins v. Palk*, 1 Russ. 475; *Hughes v. Jones*, 26 Beav. 29; *Bird v. Heath*, 6 Hare, 234.

<sup>6</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1030; *Wallis v. Thomas*, 7 Ves. 292; *Lane v. Hobbs*, 12 Ves. 458; *Needham v. Needham*, 1 Hare, 633; *Anon.*, 1 Jur. (N. S.) 973; *Clark v. Hall*, 7 Paige, 332. See § 804, *supra*.

§ 852. Bills of review — (a) Definition and classification.

A bill of review is a bill filed to reverse or modify a decree that has been signed and enrolled<sup>1</sup> for errors in law apparent upon the face of such decree, or on account of new facts discovered since publication was passed in the original cause, and which could not by the exercise of due diligence have been discovered or used before the decree was made.<sup>2</sup> A bill of review can be brought only upon a final and not an interlocutory decree,<sup>3</sup> the latter being open to correction by other methods.<sup>4</sup> A bill of review for error of law apparent

<sup>1</sup> A decree is ordinarily deemed recorded and enrolled as of the term in which the final decree was passed. *Whiting v. Bank of U. S.*, 18 Pet. 6. See § 881, *supra*.

<sup>2</sup> *Mitford's Pl.*, ch. 1, § 8, pt. 8; *Story's Equity Pleading*, §§ 408-420; *Gibson's Suits in Chancery*, § 1056; 2 *Daniell's Ch. Pr.* (5th ed.) 1575. See, also, *Jones v. Davenport* (*Jones v. Fayerweather*), 46 N. J. Eq. 287; *Smythe v. Fitzsimmons* (Ala.), 12 So. Rep. 48; *West v. Shaw's Adm'r*, 82 West Va. 195; *Greenwich Bank v. Loomis*, 2 Sandf. Ch. 70; *Moore v. Huntington*, 17 Wall. 417; *Moseley v. Partee*, 5 Heisk. 38; *Randall v. Payne*, 1 Tenn. Ch. 148, 452. A bill asking that a foreclosure decree be partially annulled on account of fraud in procuring it, but that the sale of lands already made be ratified, and time allowed for payment of a balance due, is a bill of review. *Dodge v. Northrop* (Mich.), 48 N. W. Rep. 505. Errors apparent and new facts may be united as ground of review in the same bill. *Winchester v. Winchester*, 1 Head (Tenn.), 460; *Gibson's Suits in Chancery*, § 1056; *Colville v. Colville*, 9 Humph. 529. See *Kimberly v. Arms*, 40 Fed. Rep. 548, 559. As, in Georgia, a new trial may be granted on motion in an equity cause, a bill in the nature of

a bill of review should be based on other matter than that relied on for a new trial. *Brower v. Cothran*, 75 Ga. 9; *Central Georgia Bank v. Iverson*, 75 Ga. 19. A bill of review does not lie for error apparent, in Texas (*Seguin v. Maverick*, 24 Tex. 526), or in South Carolina. *Manigalt v. Deas*, 1 Bailey's Eq. 284. It will not lie where the plaintiff himself has dismissed his bill. *Jones v. Zollicoffer*, 1 Car. Law Repos. 876.

<sup>3</sup> *Field v. Williamson*, 4 Sandf. Ch. 618; *Jenkins v. Eldredge*, 3 Story, 299; *Wiser v. Blachly*, 2 Johns. Ch. 488; *Bates v. Great Western Tel. Co.*, 35 Ill. App. 254; s. c., *aff'd*, 184 Ill. 586; 25 N. E. Rep. 753; *Johnston v. Hanner*, 2 Lea, 8; s. c., 2 *Memph. L. J.* 147. But see *Hyman v. Smith*, 10 West Va. 298. A decree of foreclosure and sale is to be considered as the final decree, without waiting for the return and confirmation of the sale by a decretal order. Consequently a bill of review for error in the sale, where none is shown in the original decree, cannot be maintained. *Whiting v. Bank of U. S.*, 18 Peters 6. See, also, *Terbell v. Lee*, 40 Fed. Rep. 40. See further as to what constitutes a final decree, § 789, *supra*, and § 940 *et seq.*, *infra*.

<sup>4</sup> See the preceding chapter and § 685, *supra*.

upon the record will lie, although the decree sought to be reviewed is a final decree, consequent upon a decree *pro confesso*, for failure of the defendant to plead.<sup>1</sup>

§ 853. (b) *Consent decrees.*— It is a general rule that a bill of review will not lie against a decree entered by consent, unless there was fraud in obtaining it.<sup>2</sup> It has been held, however, that a consent decree may be set aside or reformed for mistake by a bill of review, even though the mistake was confined to one of the parties.<sup>3</sup>

§ 854. (c) *Errors of fact.*— Upon a bill of review, either for error apparent or for new matter, the evidence in the original cause cannot be discussed for the purpose of correcting supposed erroneous deductions as conclusions from the evidence. If the decree is contrary to the proofs remedy must be sought by appeal.<sup>4</sup>

§ 855. (d) *After judgment on appeal.*— A bill of review will not lie for errors of law alleged on the face of the decree after the judgment of the appellate court.<sup>5</sup> In the federal

<sup>1</sup> *Prentiss v. Paisley*, 25 Fla. 937; s. c., 7 So. Rep. 56, citing *Stribling v. Hart*, 20 Fla. 226; *Maynard v. Percault*, 80 Mich. 160. See, however, *Cornish v. Keesee*, 24 Ark. 528. "On a bill of review being sustained, whether on error apparent or on new proof, the court reverses, alters or explains the decree complained of so as to do what is right in the case as it then stands, and when necessary will resort to any process, ordinary or extraordinary, to remedy any wrong done the complainant by the decree he complains of. But these remedies must be confined to those who were parties to the original suit, and to their representatives; and an innocent purchaser since the original decree cannot be disturbed by proceedings under a bill of review." *Gibson's Suits in Chancery*, § 1062. See, also, *Winchester v. Winchester*,

1 *Head (Tenn.)*, 460; *Bank of U. S. v. Ritchie*, 8 Pet. 123; *Prentiss v. Paisley*, 25 Fla. 937, 932.

<sup>2</sup> *Thompson v. Maxwell Land-Grant & Ry. Co.*, 95 U. S. 391.

<sup>3</sup> *Vincent v. Mathews*, 15 R. I. 509; s. c., 8 Atl. Rep. 704.

<sup>4</sup> *Buffington v. Harvey*, 95 U. S. 99; *Putnam v. Day*, 23 Wall. 60; *Kimberly v. Arms*, 40 Fed. Rep. 548; *Whiting v. Bank of United States*, 13 Pet. 6; *Beard v. Burts*, 95 U. S. 434; *Thompson v. Maxwell Land-Grant & Ry. Co.*, 95 U. S. 391; *Shelton v. Van Kleeck*, 106 U. S. 532; *Webb v. Pell*, 3 Paige, 368; *Banks v. Long*, 79 Ala. 319; *Lorentz v. Lorentz*, 82 West Va. 556; *Keck v. Allender (West Va.)*, 16 S. E. Rep. 520, 523; *Rawlings v. Rawlings*, 75 Va. 76.

<sup>5</sup> *Southard v. Russell*, 16 How. 547, where the court said: — "These may be corrected by a direct application

courts a bill of review will not lie "in the case of newly-discovered evidence, after the publication or decree below, where a decision has taken place on appeal, unless the right is reserved in the decree of the appellate court or permission be given on an application to that court directly for the purpose."<sup>1</sup> The rule applies to a decree which has been affirmed as well as to one entered upon the order of the appellate court; and the fact that the relief is sought by an original bill instead of a bill of review proper makes no difference.<sup>2</sup>

§ 856. (e) The same subject continued — The New Jersey rule.— In New Jersey, Chancellor Runyon, upon a close analysis of the authorities, declared that "the court of chancery has inherent power, without the consent of the appellate tribunal, to review, on the ground of newly-discovered evidence, its decree, though it has been passed upon on appeal; and no principle or practice requires that it shall refrain from doing so until the consent or countenance of the superior court shall have been obtained."<sup>3</sup>

to that court, which would amend, as matter of course, any error of the kind that might have occurred in entering the decree." *Davis Sewing Machine Co. v. Dunbar*, 82 West Va. 335. See, also, *Hurt v. Long* (Tenn.), 16 S. W. Rep. 968, 969; *Brewer v. Bowman*, 3 J. J. Marsh. 492; *Kimberly v. Arms*, 40 Fed. Rep. 548. Where a writ of error has been dismissed on the ground that the error assigned did not specify and point out in what particulars the decree was erroneous, a bill of review will not lie for the errors contained in such decree. *Hall v. Huff*, 76 Ga. 337.

<sup>1</sup> *Southard v. Russell*, 16 How. 547, 570, adhered to in *Franklin Sav. Bank v. Taylor* (C. C. App.), 53 Fed. Rep. 854, 866, despite the alleged "weight of reason and authority to the contrary." See, also, *Kingsbury v. Buckner*, 134 U. S. 650, 671; *Kimberly v. Arms*, 40 Fed. Rep. 548. After the decision of an appeal it was made to

appear by suggestion of counsel in open court, and by a verified petition supported by affidavits, that counsel for the defeated party conceived himself entitled to make application for leave to file a bill of review. It was held that the circuit court of appeals would not of itself determine the right of such party to file the bill, but would, in its mandate, reserve to him liberty to file an application therefor in the circuit court, and to proceed thereon, and on the bill of review, as the circuit court might determine. *Watson v. Stevens* (C. C. A.), 53 Fed. Rep. 81, where the proposed bill of review was for new matter.

<sup>2</sup> *Franklin Sav. Bank v. Taylor* (C. C. App.), 53 Fed. Rep. 854, 856.

<sup>3</sup> *Putnam v. Clark*, 35 N. J. Eq. 145, 150, where the question is elaborately argued; overruling *Jewett v. Dringer*, 4 Stew. Eq. 586, and denying the soundness of *Southard v. Russell*, 16 How. 547, and *Stafford v.*

§ 857. (f) **Error apparent.**—To sustain a bill of review for error of law apparent, the decree complained of must be contrary to some statutory enactment or to some principle or rule of law or equity recognized and acknowledged or settled by decision, or be at variance with the forms and practice of the court; but where the error is in a mere matter of form, or where the propriety of the decree is questioned, a bill of review cannot be maintained.<sup>1</sup> For the purpose of examining all errors of law, the bill, answers and other proceedings are, in this country, as much a part of the record before the court as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be ascertained.<sup>2</sup> A petition for rehearing may be treated as a bill of review for errors apparent.<sup>3</sup>

§ 858. (g) **Errors apparent illustrated.**—A decree which shows upon its face that the plaintiff was denied a hearing, and that it is not the deliberate judicial act of the court, will be set aside on a bill of review.<sup>4</sup> A decree annulling certain conveyances as fraudulent, made in a cause submitted “on bill and answer and replication without proof,” was set aside on a bill of review, where the pleadings did not authorize the

Bryan, 2 Paige, 45. See, also, *Davis Sewing Machine Co. v. Dunbar*, 32 West Va. 335; *Flower v. Lloyd*, L. R. 6 Ch. D. 297; *Legg v. Overbagh*, 4 Wend. 188; *Tommey v. White*, 1 H. L. Cas. 180; *Haskell v. Raoul*, 1 McCord's Ch. 23; *McCall v. Graham*, 1 Hen. & M. 18.

<sup>1</sup> 2 Daniell's Ch. Pr. (2d ed.) 1576; *Freeman v. Clay*, 2 U. S. App. 254; s. c., 52 Fed. Rep. 1. “The purpose of a bill of review for error apparent is to have the court rendering the decree give the same relief that the appellate court might give under the same circumstances.” *Prentiss v. Paisley*, 25 Fla. 927, 932; *Evans v. Clement*, 14 Ill. 206.

<sup>2</sup> Story's Equity Pleading (10th ed.), § 407; *Freeman v. Clay*, 2 U. S. App. 254; s. c., 52 Fed. Rep. 1; *Hoffman v.*

*Knox*, 50 Fed. Rep. (C. C. App.) 484; *Whiting v. Bank of U. S.*, 13 Pet. 6; *Putnam v. Day*, 22 Wall. 60; *Bufington v. Harvey*, 95 U. S. 99; *Thompson v. Maxwell Land-Grant & Ry. Co.*, 95 U. S. 891, 897; *Beard v. Burts*, 95 U. S. 484; *Shelton v. Van Kleeck*, 106 U. S. 532; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 7; *Prentiss v. Paisley*, 25 Fla. 927. Brooks, J., in *Parker v. Dillard*, 5 Va. Law J. 389, defines error of law apparent on the face of the decree as error appearing in the record exclusive of the evidence. See, also, *Keck v. Allender* (West Va.), 16 S. E. Rep. 520, 523.

<sup>3</sup> *Hoffman v. Knox* (C. C. App.), 50 Fed. Rep. 484, 489.

<sup>4</sup> *Ensminger v. Powers*, 108 U. S. 202.

conclusion of fraud as matter of law.<sup>1</sup> A decree dismissing a cause on the merits carries error on its face when an appeal from the same has been dismissed by the appellate court on the ground that the amount claimed was insufficient to confer jurisdiction of the appeal, and where the sum found by the appellate court to be in issue is less than the amount required to give jurisdiction to the court below;<sup>2</sup> likewise a decree in partition containing an erroneous finding that one of the parties is entitled to an estate by curtesy, where all the facts upon which the finding is based are recited in the decree.<sup>3</sup>

§ 859. (h) *The same subject continued.*— Upon a bill of review the non-joinder of a party in the original suit cannot properly be relied on as matter of error, unless it can be shown that it has operated as an injury or mischief to the rights of the present complainants.<sup>4</sup> A change by the United States Supreme Court of its ruling on a question of law and fact does not constitute such new matter as will sustain a bill of review to vacate a decree of the circuit court pronounced before such change was made.<sup>5</sup> And where a decree of a federal court fixes the priority of claims against an insolvent corporation under the authority of an act of the State legislature, the question of the validity of the act not being raised at the time, a bill of review will not lie for apparent error because the act is subsequently adjudged unconstitutional and void by the State courts on the ground of a defective title.<sup>6</sup>

§ 860. (i) *Matter of fact — What constitutes available new matter.*— In order to obtain leave to file a bill of review on

<sup>1</sup> *Clark v. Killian*, 108 U. S. 766.

<sup>2</sup> *Miller v. Clark*, 52 Fed. Rep. 900. See, also, *Ketchum v. Farmers' L. & T. Co.*, 4 McLean, 1.

<sup>3</sup> *Jackson v. Jackson* (Ill.), 83 N. E. Rep. 51. *Cf.* *Keck v. Allender* (West Va.), 16 S. E. Rep. 520, 524.

<sup>4</sup> *Whiting v. Bank of U. S.*, 18 Pet. 6, 14. Where the defendant by his answer admits the claim to be due, and prays contribution from other defendants, without setting up any defense to the demand, he cannot,

after a decree and on a bill of review, ask to have the decree set aside on the ground of laches on the part of the complainant in bringing the suit.

*Putnam v. Day*, 22 Wall. 60.

<sup>5</sup> *Tilghman v. Werk*, 39 Fed. Rep. 680.

<sup>6</sup> *Hoffman v. Knox* (C. C. App.), 50 Fed. Rep. 484 (reversing *Knox v. Iron Co.*, 42 Fed. Rep. 378); *King v. Dundee Mortg. & Tr. L. Co.*, 28 Fed. Rep. 33.

the ground of newly-discovered evidence the applicant must show that he has new competent evidence, not merely cumulative,<sup>1</sup> or relating to a collateral fact in issue of indifferent importance,<sup>2</sup> but material, and such as if unanswered in point of fact would clearly entitle the party to a decree, or would raise a question of so much difficulty as to be the fit subject of a judgment in the cause.<sup>3</sup> New evidence which simply tends to impeach the character or impair the credibility of witnesses is not sufficient.<sup>4</sup> New matter alleged to have been discovered relating to the proceedings in making a sale under a decree of foreclosure will not support a bill of review to set aside the original decree.<sup>5</sup>

§ 861. (J) The same subject continued — Illustrations.— A bill of review on the ground of fraud and perjury will not be entertained where it appears that the alleged fraudulently procured and perjured evidence was not controlling in the determination of the case on its merits.<sup>6</sup> Leave to file a bill of review will not be granted on the ground of a difference between complainant's testimony as given before a commissioner to whom the cause was referred by the Supreme Court to take an accounting, and his testimony as given at the trial of the cause, where such discrepancies do not change or affect

<sup>1</sup> *Aholtz v. Durfee*, 122 Ill. 286; and irrelevant, it should be dismissed on demurrer. *Lorentz v. Lorentz*, 88 Davis Sewing Machine Co. v. Dunbar, 82 West Va. 335; *Reynolds v. Reynolds' Ex'r*, 88 Va. 149; s. c., 18 S. E. Rep. 598; *Livingston v. Hubbs*, 8 Johns. Ch. 124; *Randolph v. Randolph*, 1 Hen. & M. 180; *Kern v. Wyatt (Va.)*, 17 S. E. Rep. 549.

<sup>2</sup> *Southard v. Russell*, 16 How. 547.

<sup>3</sup> *Traphagen v. Voorhees*, 45 N. J. Eq. 41; *Quick v. Lilly*, 8 N. J. Eq. 255; *Donovan v. Dwyer*, 62 Mich. 249; *Davis Sewing Machine Co. v. Dunbar*, 82 West Va. 335; *Lorentz v. Lorentz*, 82 West Va. 556; *Booth v. McJilton*, 82 Va. 827; s. c., 1 S. E. Rep. 187; *Purcell v. Coleman*, 4 Wall. 519; *Livingston v. Hubbs*, 8 Johns. Ch. 124. If the bill shows on its face that the new facts are immaterial

<sup>4</sup> *Traphagen v. Voorhees*, 45 N. J. Eq. 42; *Livingston v. Hubbs*, 8 Johns. Ch. 124; *Southard v. Russell*, 16 How. 547; *Kern v. Wyatt (Va.)*, 17 S. E. Rep. 549.

<sup>5</sup> *Shelton v. Van Kleeck*, 106 U. S. 582. If the new matter does not relate to any matter in issue in the original cause, but clearly demonstrates error in the decree, it seems that it may be used as ground for a bill of review. *Story's Equity Pleading* (10th ed.), § 415; *Gibson's Suits in Chancery*, § 1056.

<sup>6</sup> *Kimberly v. Arms*, 40 Fed. Rep. 548.

important circumstances upon which the judgment in part rested.<sup>1</sup> A bill of review may be maintained on the discovery of an agreement which was absent at the trial, and its absence satisfactorily accounted for.<sup>2</sup>

§ 862. (k) The same subject continued — Complainant's laches.— New matter on account of which a bill of review may be filed must be such as the party by the use of reasonable diligence could not have known.<sup>3</sup> Laches in failing to ascertain and bring forward the evidence in the former proceeding may be imputed to infants suing by guardian or next friend.<sup>4</sup> When a party alleges the finding of a document since the decree which would have been relevant evidence on the hearing, and he knew of its existence and contents, though he made diligent search for it without finding it, yet if he could have proven its existence and contents by the evidence of witnesses he should have done so, and cannot, on that ground, sustain a bill of review.<sup>5</sup> Leave to file a bill of review on the

<sup>1</sup> *Donovan v. Dwyer*, 62 Mich. 249. A bill of review to annul a decree cannot be maintained on the ground that a decree in a collateral suit between the parties, which was introduced as *res adjudicata* upon some of the issues in the cause, has, since the decree, been set aside by the court which rendered it, where it appears that the collateral decree was void for want of jurisdiction of the court, and was vacated for that reason. The vacating of the decree did not detract from its original inoperativeness as *res adjudicata*, and therefore is not new matter arising since the decree now sought to be annulled, within the rules that apply to bills of review. *Vetterlein v. Barker*, 45 Fed. Rep. 741.

<sup>2</sup> *Easley v. Kellom*, 14 Wall. 279.

<sup>3</sup> *Providence Rubber Co. v. Goodyear*, 9 Wall. 805; *Booth v. McJilton*, 82 Va. 837; s. c., 1 S. E. Rep. 137; *Murphy v. Savannah*, 73 Ga. 268; *Greer v. Turner*, 47 Ark. 17, 30; *Perkins v. Partridge*, 30 N. J. Eq. 559;

*Woodall v. Moore*, 55 Ark. 22. See, also, *Purcell v. Coleman*, 4 Wall. 519.

<sup>4</sup> *Woodall v. Moore*, 55 Ark. 22. But see *In re Houghton*, L. R. 18 Eq. 578.

<sup>5</sup> *Davis Sewing Machine Co. v. Dunbar*, 32 West Va. 335. It is not ground for a bill of review that a case is taken up and decided in the absence of counsel where the means of knowledge were within his reach and no effort is made to deceive him. *Tilghman v. Werk*, 39 Fed. Rep. 680. See, also, *Ketchum v. Breed*, 66 Wis. 85. Evidence that since a decree had been passed directing a county to pay for a bridge built under a contract as a public bridge, the contractor had bought up a charter issued by the county to another person to erect a toll-bridge at the same point, and was using the public bridge as a toll-bridge, is not sufficient to support a bill of review on the ground of newly-discovered evidence, when from the facts and circumstances the county must have



ground that the complainant had, since the decree, discovered the whereabouts of a material witness, of whose existence and materiality he knew when he began his suit, was denied on the ground of laches and the impolicy of allowing a renewal of the litigation.<sup>1</sup>

§ 863. (l) **Jurisdiction.**—A bill of review must be filed in the court wherein the decree complained of was pronounced.<sup>2</sup> A federal court cannot thus review the decree of a State court,<sup>3</sup> but it has original and ancillary jurisdiction to review its own former decree.<sup>4</sup> A court has no jurisdiction to entertain a bill of review to impeach its decree where an appeal has been taken and perfected and is still pending,<sup>5</sup> although it may have been improvidently taken and the bill avers an intention to abandon it.<sup>6</sup> But merely praying an appeal without proceeding further does not divest the trial court of jurisdiction.<sup>7</sup>

§ 864. (m) **Limitation of time for filing.**—A bill of review based upon errors apparent must ordinarily be brought within the time limited by statute for prosecuting an appeal or writ of error from the decree sought to be reviewed,<sup>8</sup> ex-

been aware of such purchase and toll-taking at the time the decree was made. *Nevada Co. v. Hicks*, 48 Ark. 515; s. c., 3 S. W. Rep. 524.

<sup>1</sup> *Putnam v. Clark*, 86 N. J. Eq. 38.

<sup>2</sup> *Gibson's Suits in Chancery*, § 1060; *Overton v. Biglow*, 10 Yerg. 50; *Wilson v. Wilson*, 10 Yerg. 201; *Anderson v. Bank*, 5 Sneed, 661. See, also, *Dodge v. Northrop* (Mich.), 48 N. W. Rep. 505; *Hurt v. Long* (Tenn.), 16 S. W. Rep. 968. In Michigan a bill of review, attacking a decree of foreclosure upon the ground that it was rendered for \$50 too much, was dismissed, the amount being insufficient, in that State, to give chancery jurisdiction. *Sanford v. Haines*, 71 Mich. 116; s. c., 38 N. W. Rep. 777.

<sup>3</sup> *Barrow v. Hunton*, 99 U. S. 80, 83.

<sup>4</sup> *Oglesby v. Attrill*, 12 Fed. Rep. 227. See §§ 84, 85, *supra*; *Lacasse v. Chapins*, 144 U. S. 119, 126.

<sup>5</sup> *Field v. Williamson*, 4 Sandf. Ch. 618; *State v. Kolsem*, 180 Ind. 484; s. c., 29 N. E. Rep. 595. See, also, *Allen v. Allen*, 80 Ala. 154; *Boynton v. Foster*, 7 Met. 415; *Mitchell v. United States*, 9 Pet. 714; *Ensminger v. Powers*, 108 U. S. 305; *Burgess v. O'Donohue*, 90 Mo. 299; s. c., 2 S. W. Rep. 308.

<sup>6</sup> *Kimberly v. Arms*, 40 Fed. Rep. 548.

<sup>7</sup> *State v. Kolsem*, 180 Ind. 484; s. c., 29 N. E. Rep. 595.

<sup>8</sup> *Trust Co. v. Grant Locomotive Works*, 185 U. S. 208; *Clark v. Killian*, 108 U. S. 706; *McDonald v. Whitney*, 39 Fed. Rep. 466; *Thomas v. Harvie's Heirs*, 10 Wheat. 146; *Ensminger v. Powers*, 108 U. S. 292; *Knox v. Columbia Liberty Iron Co.*, 42 Fed. Rep. 878, 880; *Dunlevy v. Dunlevy*, 38 Fed. Rep. 459; *Kennedy v. Georgia State Bank*, 8 How. 586;

cept in case of the complainant's disability.<sup>1</sup> If it be filed within that time it is not, in the absence of special facts requiring speedier action, barred by laches.<sup>2</sup> It seems that the time required for filing a bill of review for new matter is wholly within the discretion of the court.<sup>3</sup>

§ 865. (n) The same subject continued — Computation of time.— Time does not run against the right to file a bill of review so long as an appeal is pending from the decree.<sup>4</sup> The period between a void order vacating an order made in a foreclosure suit giving certain intervening petitioners a lien prior to the mortgage and an order setting it aside cannot be omitted in computing the time within which the mortgagee might file a bill to review the original order for errors apparent of record, as he had no right to rely on the validity of the vacating order, or on the acquiescence therein of the petitioners. Where a

*Jackson v. Jackson* (Ill.), 88 N. E. Rep. 51; *Taylor v. Charter Oak Ins. Co.*, 17 Fed. Rep. 566; *Boyd v. Vanderkemp*, 1 Barb. Ch. 278; *Smith v. Clay*, Amb. 645; *Lytton v. Lytton*, 4 Bro. Ch. 441; *Lyons v. Robbins*, 46 Ill. 278; *Bell v. Johnson*, 111 Ill. 374; *Peirce v. Graham*, 85 Va. 227; s. c., 7 S. E. Rep. 189; *Sanford v. Haines*, 71 Mich. 116; s. c., 38 N. W. Rep. 777; *Littleton's Appeal*, 98 Pa. St. 177; *Sloan v. Sloan*, 102 Ill. 581; *Bruschke v. Des Nord Chicago Schuetzen Verein* (Ill.), 39 N. E. Rep. 417; *Allison v. Drake* (Ill.), 82 N. E. Rep. 587, citing *Dalton v. Erb*, 53 Ill. 289; *Pestel v. Primm*, 109 Ill. 858. See, also, *McConnel v. Gibson*, 12 Ill. 128; *Boyden v. Reed*, 55 Ill. 458; *Harris v. Cornell*, 80 Ill. 54; *Howe v. Comm'rs*, 119 Ill. 101.

<sup>1</sup> *Allison v. Drake* (Ill.), 82 N. E. Rep. 587.

<sup>2</sup> *Chicago Building Soc. v. Haas*, 111 Ill. 176; *Farmers' L. & T. Co. v. Green Bay &c. R. Co.*, 16 Fed. Rep. 100, 118.

<sup>3</sup> The point was left undecided in *Thomas v. Harvie's Heirs*, 10 Wheat.

146. See *Myers v. Pickett*, 81 Tex. 50; s. c., 16 S. W. Rep. 648; *Central Trust Co. v. Grant Locomotive Works*, 185 U. S. 208. An application for a bill of review, made in 1889, on facts known by petitioners in 1881, comes too late, even if the facts constituted a good ground for relief. *Tilghman v. Werk*, 39 Fed. Rep. 680. After the same period an application was refused in *Ferguson v. Dent*, 29 Fed. Rep. 1. See, also, *Bergholz v. Ruckman*, 41 N. J. Eq. 134. But if the usual period of limitation has elapsed it must be filed promptly upon discovery of the facts. *Central Trust Co. v. Grant Locomotive Works*, 185 U. S. 208. "There can be no doubt that it will be a good bar that the bill of review is not brought within the period limited for writs of error, after the discovery of the new facts or evidence." *Story's Equity Pleading* (10th ed.), § 419.

<sup>4</sup> *Ensminger v. Powers*, 108 U. S. 292.

<sup>5</sup> *Central Trust Co. v. Grant Locomotive Works*, 185 U. S. 207.

decree in partition is rendered finding the rights of the parties, ordering partition of the land, and appointing commissioners to make partition, and the suit is then continued from term to term, for several years, for the commissioners' report, and finally dismissed without either partition or sale, the time for filing a bill of review runs from the date of the decree, and not from the final dismissal of the suit.<sup>1</sup>

§ 866. (o) *Leave to file — When necessary.*— For error apparent on the face of the decree a bill of review may be filed without leave;<sup>2</sup> but a bill of review on the ground of newly-discovered matter can only be filed on special leave, which depends on the sound discretion of the court to which application is made.<sup>3</sup> If fraud in obtaining the decree<sup>4</sup> or error ap-

<sup>1</sup> *Jackson v. Jackson* (Ill.), 33 N. E. Rep. 51. A bill of review is in time if filed within the required time, after a decree confirming a sale of land, directing the distribution of the proceeds, and striking the cause from the docket, though the errors were committed in a decree of sale rendered more than three years before, the earlier decree, though appealable, not being the final decree in the cause. *Peirce v. Graham*, 85 Va. 227; s. c., 7 S. E. Rep. 189. Code of Alabama of 1886, section 8497, limiting the time for "application" to file bills of review, does not require the bill itself to be filed within that time. *Mitchell v. Hardie*, 84 Ala. 349; s. c., 4 So. Rep. 182. Where a subpoena was taken out upon a bill of review, and a *bona fide* attempt made to serve it within five years from the entry of the original decree, it was held to be a sufficient commencement of the suit, although the subpoena was not in fact served within the time allowed by law for appealing from the decree. *Webb v. Pell*, 1 Paige, 564.

<sup>2</sup> *Buckingham v. Corning*, 29 N. J. Eq. 238; *Webb v. Pell*, 1 Paige, 564;

*Ross v. Prentiss*, 4 McLean, 106; *Davis v. Speiden*, 104 U. S. 88. See *Kimberly v. Arms*, 40 Fed. Rep. 548, 552. See, also, *Riggs v. Huffman*, 38 West Va. 426, 430.

<sup>3</sup> *Ross v. Prentiss*, 4 McLean, 106; *Ricker v. Powell*, 100 U. S. 104; *Anon.*, 2 P. Wms. 263; *Perry v. Phelps*, 17 Ves. 173; *Buckingham v. Corning*, 29 N. J. Eq. 238; *Kimberly v. Arms*, 40 Fed. Rep. 548, 552; *Davis Sewing Machine Co. v. Dunbar*, 32 West Va. 385; *Providence Rubber Co. v. Goodyear*, 9 Wall. 805; *Thomas v. Harvie's Heirs*, 10 Wheat. 146; *Lansing v. Albany Ins. Co.*, Hopk. Ch. 102, 105; *Webb v. Pell*, 1 Paige, 564; *Priestley's Appeal*, 127 Pa. St. 420, citing *Riddle's Estate*, 19 Pa. St. 431; *Russell's Appeal*, 34 Pa. St. 258; *Hartman's Appeal*, 36 Pa. St. 70; *Milligan's Appeal*, 32 Pa. St. 389; *Scott's Appeal*, 112 Pa. St. 427; *Bishop's Appeal*, 26 Pa. St. 470; *Stevenson's Appeal*, 32 Pa. St. 318. Whether an infant must obtain leave before filing a bill of review, query. *In re Houghton*, L. R. 18 Eq. 578. See *Taylor v. Franklin Sav. Bank*, 50 Fed. Rep. 289, 294. In Virginia the practice is to

<sup>4</sup> *Kimberly v. Arms*, 40 Fed. Rep. 548.

parent<sup>1</sup> be united with new matter as a ground for relief, leave to file the bill is necessary.<sup>2</sup> Where a bill of review is filed without leave, or inconsistent with or in excess of the leave granted, it will be ordered to be taken from the files.<sup>3</sup>

§ 867. (p) **The same subject continued — Leave discretionary — Review of discretion.**— The granting of a bill of review for newly-discovered evidence, resting in the sound discretion of the court, may be refused, although the facts, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause inadvisable.<sup>4</sup> In order to obtain leave to file a bill of review against a judgment fraudulently obtained it must be averred and shown that there is a valid defense on the merits.<sup>5</sup> Whether an appeal lies from a refusal of leave to file a bill of review has not been decided by the federal courts.<sup>6</sup> In some of the State courts it seems that the exercise of discretion in this behalf may be reviewed on appeal;<sup>7</sup> but will not be reversed except in a clear case of abuse.<sup>8</sup>

§ 868. (q) **Application for leave.**— Leave to file a bill of review for new matter should be obtained by a petition praying for leave to file the bill, and supported by an affidavit showing that the alleged new matter was not known to the petitioner and could not have been discovered by him, with the exercise of due diligence, in time to prove it before the entry of the decree sought to be reviewed.<sup>9</sup> Notice of the

apply in the first instance for leave to file a bill of review, whether it be for error apparent or for new matter. *Quarrier v. Carter*, 4 Hen. & M. 248. See, also, *Hill v. Bowyer*, 18 Gratt. 363, 367; *Amiss v. McGinnis*, 12 West Va. 371.

<sup>1</sup> *Ricker v. Powell*, 100 U. S. 104.

<sup>2</sup> "The bill cannot be separated into parts and leave be granted as to part and refused as to other parts." Per Jackson, J., in *Kimberly v. Arms*, 40 Fed. Rep. 548, 558.

<sup>3</sup> *Buckingham v. Corning*, 29 N. J. Eq. 238; *Carroll v. Parran*, 1 Bland, 125, note.

<sup>4</sup> *Story's Equity Pleadings*, § 417; *Putnam v. Clark*, 36 N. J. Eq. 33, 86; *Ricker v. Powell*, 100 U. S. 104.

<sup>5</sup> *Kimberly v. Arms*, 40 Fed. Rep. 548.

<sup>6</sup> *Nickle v. Stewart*, 111 U. S. 776.

<sup>7</sup> *Woodall v. Moore*, 55 Ark. 22; *Stockley v. Stockley (Mich.)*, 53 N. W. Rep. 523, 525.

<sup>8</sup> *Stockley v. Stockley (Mich.)*, 53 N. W. Rep. 523, 525. See, also, *Craig v. Smith*, 100 U. S. 226.

<sup>9</sup> *Wortley v. Birkhead*, 2 Ves. Sr. 571; *Young v. Keighly*, 16 Ves. 348; *Purcell v. Miner*, 4 Wall. 519; *Ross v. Prentiss*, 4 McLean, 106; *Massie v.*

petition should be served on the other parties to the cause.<sup>1</sup> But where no notice is given the adverse party, and such irregularity is not assigned as cause of demurrer, and no motion is made to have the application taken off the file, the adverse party, after answering and allowing the case to proceed to final decree, cannot object on appeal.<sup>2</sup> The affidavit must also state the nature of the new matter in order that the court may exercise its judgment upon its relevancy and materiality.<sup>3</sup> The affidavit should be positive and not merely upon information and belief.<sup>4</sup> On the hearing of the petition affidavits may be admitted on both sides, if necessary, to explain the nature of the evidence.<sup>5</sup> Leave may be refused for the benefit of the party applying and granted for the protection of the interests of others.<sup>6</sup> The finding of facts by the court on the petition is not conclusive at the hearing on the bill.<sup>7</sup> If a bill of review be filed without the requisite leave or in excess of the leave granted it is open to demurrer,<sup>8</sup> or will be stricken off the files upon motion.<sup>9</sup>

Graham, 8 McLean, 41; *Dexter v. Arnold*, 5 Mason, 303; *Traphagen v. Voorhees*, 45 N. J. Eq. 42, 49. Knowledge by the petitioner's attorney is knowledge by the petitioner. *Greenlee v. McDowell*, 4 Ired. Eq. (S. C.) 481; *Norris v. Le Neve*, 8 Atk. 28. If the new evidence is oral the names of the witnesses should be stated and what each one will swear to. *Greer v. Turner*, 47 Ark. 17, 80.

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1578.

<sup>2</sup> *Mitchell v. Hardie*, 84 Ala. 349; s. c., 4 So. Rep. 183.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), § 412; *Tilghman v. Werk*, 39 Fed. Rep. 680; *In re Doyle*, 14 R. I. 55.

<sup>4</sup> *Kern v. Wyatt* (Va.), 17 S. E. Rep. 549, where affidavits not made on personal knowledge were rejected. *Page v. Holmes Burglar Alarm Tel. Co.*, 2 Fed. Rep. 880. "It is not sufficient that the party expects to prove certain facts. He must file the affidavit of witnesses in support of his averments." *Whitten v. Saunders*, 75 Va.

573. But see *Quick v. Lilly*, 8 N. J. Eq. 255, where it was said that the court will not, before granting leave to file a bill of review, inquire whether the petitioner can prove the facts set out in his petition, and that if the facts and matters set forth verified by his own oath are such as lay the foundation for a bill of review, it is all that is required.

<sup>5</sup> *Dexter v. Arnold*, 5 Mason, 303; *Hollingsworth v. McDonald*, 2 Harr. & J. 230; *Long v. Granberry*, 2 Tenn. Ch. 85.

<sup>6</sup> *Hodges v. Milliken*, 1 Bland, 511. As to costs of the application, see *Whelan v. Cook*, 29 Md. 1; *Partington v. Reynolds*, 6 W. R. 615.

<sup>7</sup> *Elliott v. Balcom*, 11 Gray, 286.

<sup>8</sup> *Bainbrigg v. Baddeley*, 2 Phil. 705; *Henderson v. Cook*, 4 Drew. 806; *Knight v. Atkisson*, 2 Tenn. Ch. 385.

<sup>9</sup> *Carroll v. Parran*, 1 Bland, 185; *Buckingham v. Corning*, 29 N. J. Eq. 288, 241.

§ 869. (r) **Performance of decree as a condition precedent.**—The rule requiring performance of the decree is a regulation of practice, not a limitation of jurisdiction; failure to aver payment or excuse is not ground of demurrer, but should be taken advantage of by motion to stay proceedings,<sup>1</sup> or to strike the bill from the files.<sup>2</sup> Where a bill of review is filed before performance of the decree, and stayed for that reason, a supplemental bill setting up performance is proper;<sup>3</sup> and whether the court will examine the decree before performance is a matter of sound discretion applied to the particular facts.<sup>4</sup> So if compliance with the decree would extinguish a right of the party, as the execution of an acquittance, or the like,<sup>5</sup> or if he shows himself absolutely unable to comply, as, for instance, where he is required to pay a sum of money and is insolvent,<sup>6</sup> he may show the facts to the court and obtain relief from performance, but the bill cannot be filed without such previous dispensation.<sup>7</sup> If leave be refused on account of failure to perform it is not a bar to another application after performance.<sup>8</sup>

§ 870. (s) **The same subject continued.**—It is a general rule, founded on an ordinance of Lord Bacon, that performance of a decree is a condition precedent to filing a bill of review;<sup>9</sup> as if it be for land he must surrender possession;<sup>10</sup> if it

<sup>1</sup> *Miller v. Clark*, 47 Fed. Rep. 850.

<sup>2</sup> *Davis v. Speiden*, 104 U. S. 88; *Bruschke v. Der Nord Chicago Schuetzen Verein (Ill.)*, 84 N. E. Rep. 417, 419.

<sup>3</sup> *Miller v. Clark*, 49 Fed. Rep. 695.

<sup>4</sup> *Davis v. Speiden*, 104 U. S. 88.

<sup>5</sup> *Griggs v. Gear*, 8 Gilm. (Ill.) 2; *Massie v. Graham*, 8 McLean, 41; *Story's Equity Pleading* (10th ed.), § 406; 2 *Daniell's Ch. Pr.* (5th ed.) 1582; *Kuttner v. Haines*, 185 Ill. 382; *Williams v. Mellish*, 1 Vern. 117.

<sup>6</sup> *Livingston v. Hubbs*, 8 Johns. Ch. 124; *Griggs v. Gear*, 8 Gilm. (Ill.) 2; *Wiser v. Blachly*, 2 Johns. Ch. 488; *Stalring v. Goodloe*, 8 Murphy, 159. Or where the time for performance has not arrived. *Partredge v. Us-*

*borne*, 5 Russ. 195, 244, 258. For other exceptions, see *Taylor v. Taylor*, 12 Beav. 220, 224, 228; *Taylor v. Pearson*, 2 Hawkes, 298; *Fitton v. Earl of Macclesfield*, 1 Vern. 264; *Partridge v. Perkins*, 82 N. J. Eq. 899.

<sup>7</sup> *Griggs v. Gear*, 8 Gilm. 2; *Story's Equity Pleading* (10th ed.), § 406.

<sup>8</sup> *Ricker v. Powell*, 100 U. S. 104.

<sup>9</sup> *Story's Equity Pleading* (10th ed.), § 406; *Wiser v. Blachly*, 2 Johns. Ch. 488; *Hoffman v. Knox* (C. C. App.), 50 Fed. Rep. 484.

<sup>10</sup> *Kuttner v. Haines*, 185 Ill. 382; s. c., 25 N. E. Rep. 752; *Story's Equity Pleading* (10th ed.), § 406; *Griggs v. Gear*, 8 Gilm. (Ill.) 2.

be for money, the money must be paid;<sup>1</sup> if for evidences, the evidences must be brought in,<sup>2</sup> and he must likewise pay the costs,<sup>3</sup> although the court had no jurisdiction of the case.<sup>4</sup> The bill must aver<sup>5</sup> performance of or inability to perform the decree sought to be reviewed.<sup>6</sup>

§ 871. (t) *Security for costs.*—It was one of the ordinances of Lord Bacon “that no bill of review shall be put in except the party that prefers it enters into a recognizance with sureties for satisfying of costs and damages for the delay if it be found against him.”<sup>7</sup> By an order in chancery (made in March, 1700), the party filing the bill was required to deposit £50 with the registrar of the court.<sup>8</sup> This rule would doubtless be enforced in the federal courts.<sup>9</sup> Where the solicitor for the complainant in a bill of review acted under a mistake as to the practice requiring a deposit, he was allowed

<sup>1</sup>*Ricker v. Powell*, 100 U. S. 104. Where a decree was made by a federal circuit court foreclosing a mortgage and ordering a sale, erroneously omitting any right of redemption as provided by the State statute (see § 7, *supra*), a bill of review cannot be maintained by the mortgagor after the statutory time to redeem has passed if he has made no offer to redeem. *Burley v. Flint*, 105 U. S. 247.

<sup>2</sup>*Story's Equity Pleading* (10th ed.), § 406; 2 *Daniell's Ch. Pr.* (5th ed.) 1582.

<sup>3</sup>*Ricker v. Powell*, 100 U. S. 104. Dispensed with where the party was very poor. *Fitton v. Earl of Maccolesfield*, 1 Vern. 264.

<sup>4</sup>*Miller v. Clark*, 47 Fed. Rep. 850.

<sup>5</sup>*Kimberly v. Arms*, 40 Fed. Rep. 548; *Kuttner v. Haines*, 185 Ill. 882; s. c., 25 N. E. Rep. 752; *Judson v. Stephens*, 75 Ill. 255. An averment of inability is insufficient unless the court, before the filing of the bill, dispensed with performance. *Griggs v. Gear*, 3 Gilm. (Ill.) 2.

<sup>6</sup>This provision is administrative

rather than jurisdictional, and the bill is not subject to demurrer if it fails to set forth that recognizance has been entered into. “Undoubtedly the court would strike a bill from the files if it got there without . . . the security required, unless good cause was shown why it had not been done. That would be a far different thing from dismissing a bill on demurrer.” Per Waite, C. J., in *Davis v. Speiden*, 104 U. S. 88.

<sup>7</sup>*Beames' Orders*, 318; *Anon.*, 2 P. Wms. 288. See 2 Atk. 189; *Hinde's Pr.* 57, 58.

<sup>8</sup>*Davis v. Speiden*, 104 U. S. 88. See §§ 2, 3, ch. I, *supra*. Five dollars is deemed to be the equivalent of a pound sterling. § 17, *supra*. One hundred dollars was the amount required in the New York court of chancery, by analogy with the law regulating appeals, *Webb v. Pell*, 1 Paige, 564; *Field v. Williamson*, 4 Sandf. Ch. 618; *Pendleton v. Fay*, 3 Paige, 204; and in the New Jersey court of chancery. *Quick v. Lilly*, 8 N. J. Eq. 265.

after the commencement of the suit to make the deposit *nunc pro tunc*.<sup>1</sup>

§ 872. (u) **Who may file.**—No persons, except the parties and their privies in representation, such as heirs, executors or administrators, can have a bill of review, strictly so called.<sup>2</sup> It does not lie in behalf of assignees;<sup>3</sup> and no party to a decree can, by the general principles of equity, claim a reversal of it upon a bill of review unless he has been aggrieved by it, whatever may have been his right to insist on the error at the original hearing or on appeal.<sup>4</sup> The bill must show by proper allegations that the party filing it is interested in the matter disposed of by the decree, what those interests are, and that he will be benefited by a reversal or modification of the decree.<sup>5</sup> Generally all the parties to the original decree, if living, should join in a bill of review.<sup>6</sup>

<sup>1</sup> Webb v. Pell, 1 Paige, 564.

<sup>2</sup> Story's Equity Pleading (10th ed.), § 409; Kennedy v. Bell, Litt. Sel. Ca. 125; Amiss v. McGinnis, 12 West Va. 871; *In re Doyle*, 14 R. I. 55. Strangers aggrieved must proceed by original bill in the nature of a bill of review. Pierce v. Brady, 28 Beav. 64; Noble v. Stow, 29 Beav. 409; *In re Doyle*, *supra*. If a bondholder, not a party to the suit, can under any circumstances bring a bill of review to open a decree of foreclosure, in a suit by the trustee he can have only such relief as the latter would be entitled to in the same proceeding. Shaw v. Little Rock &c. R. Co., 100 U. S. 605. A suit by heirs to set aside a decree rendered against their ancestor, disposing of certain lands, they not having been privies of deceased or parties to the suit, should be by original bill and not by bill of review. Curry v. Peebles, 83 Ala. 225; s. c., 8 So. Rep. 622.

<sup>3</sup> Gibson v. Green (Va.), 16 S. E. Rep. 661; Thompson v. Maxwell, 95 U. S. 891; Armstead v. Bailey, 83 Va. 242; s. c., 2 S. E. Rep. 38.

<sup>4</sup> Whiting v. Bank, 18 Pet. 6; Thomas v. Brockenbrough, 10 Wheat. 146; Webb v. Pell, 8 Paige, 368; Winchester v. Winchester, 1 Head, 460; Montgomery v. Olwell, 1 Tenn. Ch. 169.

<sup>5</sup> Riggs v. Huffman, 83 West Va. 426; s. c., 10 S. E. Rep. 795. See, also, Laidley v. Kline, 25 West Va. 208; Hall v. Lowther, 23 West Va. 570; Miller v. Rose, 31 West Va. 391; Shrewsbury v. Miller, 10 West Va. 115; Sanford v. Haines, 71 Mich. 116; Friley v. Hendricks, 27 Miss. 412; Dexter v. Arnold, 5 Mason, 308.

<sup>6</sup> Bank of United States v. White, 8 Pet. 263; Amiss v. McGinnis, 12 West Va. 871; Fuller v. McFarland, 6 Heisk. 79, where the bill was dismissed on demurrer for want of a material party, which is characterized by Chancellor Gibson as a harsh ruling, because he should have been brought in by amendment. Gibson's Suits in Chancery, § 1076, n. 2. Where the defendants in a decree were not necessary parties to the suit, one or more of them may maintain a bill of review to reverse it



§ 873. (v) **Parties.**—A decree cannot be set aside upon the ground of fraud or for any other cause without having all the parties to the decree before the court.<sup>1</sup> So in a bill of review it is indispensable that all the parties to the original decree should be included;<sup>2</sup> and if they be dead their legal representatives must be made parties.<sup>3</sup> In cases where it is sought to review a decree wholly *in personam* the words “legal representative” mean an executor or administrator or devisee in a will who has the power and authority under the law to represent the estate of a deceased person.<sup>4</sup> One to whom an original party, since deceased, conveyed all his estate in trust for his heirs is not a representative within the foregoing application of the rule.<sup>5</sup>

§ 874. (w) **Frame of bill.**—In a bill of review it is necessary to state the former bill and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it,<sup>6</sup> and the ground of law or matter discovered upon which he seeks to impeach it.<sup>7</sup> A synopsis of the former proceedings is not sufficient<sup>8</sup> and is

without making the co-defendants parties thereto. *King v. Dundee Mortg. & Tr. I. Co.*, 28 Fed. Rep. 83.

<sup>1</sup> “In the vast multitude of authorities none can be found to the contrary.” *Ralston v. Sharon*, 51 Fed. Rep. 702, 712; *Harwood v. Railroad Co.*, 17 Wall. 80; *Wickliffe v. Eva*, 17 How. 470.

<sup>2</sup> *Friley v. Hendricks*, 27 Miss. 412; *Bank v. White*, 8 Pet. 268; *Story's Equity Pleading* (10th ed.), § 420.

<sup>3</sup> *Ralston v. Sharon*, 51 Fed. Rep. 702, 714; *Friley v. Hendricks*, 27 Miss. 412.

<sup>4</sup> *Ralston v. Sharon*, 51 Fed. Rep. 702, 715. See, also, *Johnson v. Van Epps*, 110 Ill. 559; *Cox v. Curwen*, 118 Mass. 198; *Cochran v. Cochran*, 127 Pa. St. 490; *s. c.*, 17 Atl. Rep. 961; *Railroad &c. Co. v. Bryan*, 8 Sm. & M. 234; *Warnecke v. Lembca*, 71 Ill. 91; *Bowman v. Long*, 89 Ill. 19.

<sup>5</sup> *Ralston v. Sharon*, 51 Fed. Rep. 702.

<sup>6</sup> *Story's Equity Pleading* (10th ed.), § 420, quoted and approved in *Turner v. Berry*, 8 Gilm. (Ill.) 544, holding it necessary to state all the proceedings in the original cause except the evidence; followed in *Garner v. Emerson*, 40 Ill. 279; *Judson v. Stephens*, 75 Ill. 255; *Goodrich v. Thompson*, 88 Ill. 207, and *Kuttner v. Haines*, 135 Ill. 382, requiring the pleader to set out *in extenso* the bill, answer, replication and decree in the original suit, *Aholz v. Durfee*, 122 Ill. 286. See, also, *Bruschke v. Der Nord Chicago Schuetzen Verein* (Ill.), 84 N. E. Rep. 417, illustrating a sufficient compliance with the rule. The bill must show the interests of the party filing it. § 872, *supra*.

<sup>7</sup> *Story's Equity Pleading* (10th ed.), § 420.

<sup>8</sup> *Kuttner v. Haines*, 135 Ill. 382; *Goodrich v. Thompson*, 88 Ill. 207; *Aholz v. Durfee*, 122 Ill. 286. See,

ground for demurrer;<sup>1</sup> but the objection cannot be raised for the first time in the appellate court,<sup>2</sup> and may be waived by stipulation.<sup>3</sup> A bill of review cannot operate as an amendment to the original bill.<sup>4</sup>

§ 875. (x) **The same subject continued.**—If a bill of review for error apparent contains the evidence taken in the original cause, it is bad on demurrer.<sup>5</sup> In a bill of review for new matter the evidence may perhaps be adverted to for the purpose of showing the relevancy and bearing of the new matter sought to be introduced;<sup>6</sup> but it would be plainly demurrable if any relief were sought upon the ground that the evidence did not establish the facts upon which the original decree was based.<sup>7</sup> A bill of review for errors on the face of the decree alone need not aver a special leave of the court;<sup>8</sup> but in a bill of review for new matter it seems necessary to state the leave obtained and the fact of the discovery, though it may be doubted whether, after leave given to file the bill, that fact is traversable.<sup>9</sup> Uniting three grounds of review in one bill, viz., fraud, error apparent and newly-discovered evidence, renders the bill multifarious.<sup>10</sup> The bill may simply pray that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution.<sup>11</sup> If it has been carried into execution, the bill may also pray the further decree of the court to put the party complaining of the former decree into the situation in which he would

also, the cases cited in the last note but one.

<sup>1</sup>Cox v. Lynn, 188 Ill. 195; s. c., 29 N. E. Rep. 847.

<sup>2</sup>Allison v. Drake (Ill.), 82 N. E. Rep. 537.

<sup>3</sup>Lewis v. Pleasants (Ill.), 80 N. E. Rep. 328; s. c., affirmed, 82 N. E. Rep. 384.

<sup>4</sup>Snyder v. Botkin (West Va.), 16 S. E. Rep. 591, 595.

<sup>5</sup>Buffington v. Harvey, 95 U. S. 99, holding that the demurrer ought to be special.

<sup>6</sup>Buffington v. Harvey, 95 U. S. 99;

Cortee v. Lyons, 19 D. C. (8 Mackey), 207.

<sup>7</sup>Cortee v. Lyons, 19 D. C. (8 Mackey), 207. See § 854, *supra*.

<sup>8</sup>Davis v. Speiden, 104 U. S. 83.

<sup>9</sup>Mitford's Pl., ch. 1, § 8, pt. 8. But this doubt may be questioned. Story's Equity Pleading (10th ed.), § 420.

<sup>10</sup>Kimberly v. Arms, 40 Fed. Rep. 548, 559. See Winchester v. Winchester, 1 Head (Tenn.), 460; page 858, n. 2, *supra*.

<sup>11</sup>Story's Equity Pleading (10th ed.),

§ 420.

have been if that decree had not been executed.<sup>1</sup> If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand.<sup>2</sup> The bill may also, if the original suit has become abated, be at the same time a bill of revivor.<sup>3</sup> A supplemental bill may likewise be added if any event has happened which requires it,<sup>4</sup> and particularly if any person not a party to the original suit becomes interested he must be made a party to the bill of review by way of supplement.<sup>5</sup> The complainant cannot, however, put his case in the alternative, as a bill of review, or, if the court shall think it not good as such, then as a bill of review and supplement.<sup>6</sup> A bill of review should be signed by counsel and otherwise conform in general to the requirements of an original bill.<sup>7</sup>

§ 876. (y) **Defense to bills for errors apparent.**—The usual defense to a bill of review for error apparent is a demurrer,<sup>8</sup> to which may be joined a plea setting forth the original decree, which, however, seems to be unnecessary where such decree is fully and fairly stated in the bill.<sup>9</sup> The truth of any fact averred in that kind of a bill of review, inconsistent with the decree, is not admitted by a demurrer, because no error can be assigned on such a fact; and it is therefore not properly pleaded.<sup>10</sup> If the demurrer is overruled the orig-

<sup>1</sup> Story's Equity Pleading (10th ed.), § 490.

<sup>2</sup> Story's Equity Pleading (10th ed.), § 420.

<sup>3</sup> Story's Equity Pleading (10th ed.), § 420.

<sup>4</sup> *Buckingham v. Corning*, 29 N. J. Eq. 288; Story's Equity Pleading (10th ed.), § 420.

<sup>5</sup> Story's Equity Pleading (10th ed.), § 420.

<sup>6</sup> *Perry v. Phelps*, 17 Ves. 178.

<sup>7</sup> Mitford's Pl., ch. 1, § 2, pt. 2. Where a decree in favor of the complainant on a bill of review was reversed, but it appeared that the relief was proper on a bill with another aspect, and the questions had been fully litigated on the proofs, the

Supreme Court remanded the case with instructions to permit suitable amendments. *Thompson v. Maxwell Land-Grant & Ry. Co.*, 95 U. S. 391.

<sup>8</sup> Mitford's Pl., ch. 2, § 2, pts. 1, 5. A demurrer to a bill of review, exhibiting the entire original record, is not improper, but a simple demurrer is sufficient. *Hurt v. Long* (Tenn.), 16 S. W. Rep. 968.

<sup>9</sup> 2 Daniell's Ch. Pr. (5th ed.) 1538; *Webb v. Pell*, 3 Paige, 363.

<sup>10</sup> *Shelton v. Van Kleeck*, 106 U. S. 532. On a bill of review alleging that the decree was not enrolled, a demurrer insisting that the decree was enrolled is objectionable as a speaking demurrer. The defendant

inal decree may be reversed without any further hearing.<sup>1</sup> If it is sustained the original decree is thereby confirmed.<sup>2</sup> No errors can be noticed except those which are specifically pointed out by the bill.<sup>3</sup> "When any matter beyond the decree is to be offered against opening the enrolment, as length of time, that matter must be pleaded; otherwise the plaintiff will not have the benefit of exceptions, as infancy, coverture or the like."<sup>4</sup>

§ 877. (z) Defense to bills of review for new matter.—Bills of review containing new matter are in the nature of original bills, so far forth as such new matter is concerned, and admit of an answer and a replication, and proceedings appertaining to an issue of fact; but only as it relates to the truth and sufficiency of such new matter, and the propriety of its admission for the purpose of opening the decree in the original cause.<sup>5</sup> The defendant may probably demur for irrelevancy of the new matter, "although the relevancy ought to be considered at the time leave is given to bring the bill."<sup>6</sup> Such a bill is liable to any plea which would have avoided the effect of that matter if stated in the original bill.<sup>7</sup> If a demurrer is overruled, the defendant must answer;<sup>8</sup> if allowed, the suit is at an end.<sup>9</sup> The facts concerning the discovery of the new matter may be questioned by plea,<sup>10</sup> or, it seems, may be traversed by answer and evidence.<sup>11</sup> "Upon the argument

should plead the decree as enrolled and demur against opening it. Nor should he therein allege a want of affidavit; that is matter for motion to strike the bill from the files for irregularity. *Tallmadge v. Lovett*, 8 Edw. Ch. 563.

<sup>1</sup> *Bruschke v. Der Nord Chicago Schuetzen Verein* (Ill.), 84 N. E. Rep. 417; *Cook v. Bamfield*, 8 Swanst. 607.

<sup>2</sup> *Webb v. Pell*, 3 Paige, 368.

<sup>3</sup> *Moore v. Moore*, 2 Ves. 598; *Green v. Jenkins*, 1 De G., F. & J. 470; *La Grange &c. R. Co. v. Rainey*, 7 Coldw. 447; *Livingston v. Noe*, 1 Lea, 62.

<sup>4</sup> *Mitford's Pl.*, ch. 2, § 2, pt. 2.

<sup>5</sup> *Buffington v. Harvey*, 95 U. S. 99. The introduction of newly-discovered evidence under a bill of review to

prove facts in issue on the former hearing rests in the sound discretion of the court, to be exercised sparingly. *Snyder v. Botkin* (West Va.), 16 S. E. Rep. 591; *Craig v. Smith*, 100 U. S. 226, holding that the appellate court, in the absence of the evidence produced below, will presume that the discretion was properly exercised.

<sup>6</sup> *Mitford's Pl.*, ch. 2, § 2, pt. 2.

<sup>7</sup> *Daniell's Ch. Pr.* (5th ed.) 1583, 1584.

<sup>8</sup> *Cook v. Bamfield*, 8 Swanst. 607.

<sup>9</sup> *Mitford's Pl.*, ch. 2, § 2, pt. 2.

<sup>10</sup> *Lewellin v. Macworth*, 2 Atk. 40.

<sup>11</sup> *Dexter v. Arnold*, 5 Mason, 303; *United States v. Sampeyreac*, Hempst. 118; 2 *Daniell's Ch. Pr.* (5th ed.) 1584.

of the demurrer nothing can be read except the bill of review and the decree,<sup>1</sup> and in the federal courts the record<sup>2</sup> in the original suit; but after the demurrer has been overruled the plaintiff is at liberty to read any evidence that was submitted therein, as at a rehearing, the cause being then equally open.”<sup>3</sup>

**§ 878. (aa) Restitution of costs paid upon sustaining bill.** Where the complainant paid the costs awarded against him by the original decree which dismissed his bill on the merits, the court will not order a restitution of the costs, upon sustaining a bill of review for want of jurisdiction apparent on the face of the decree, unless it is absolutely compelled to do so by strict law.<sup>4</sup>

**§ 879. Vacating decrees for surprise or irregularity.**—“It has long been settled that an enrolment will be vacated and a decree opened where the decree has been made unjustly against a right or interest that has not been heard or protected, when this has been done without the laches or fault of the party who applies.”<sup>5</sup> It is a matter of sound discre-

<sup>1</sup> *Catterall v. Purchase*, 1 Atk. 290.

<sup>2</sup> *Whiting v. Bank of United States*, 18 Pet. 18; *Story's Equity Pleading* (10th ed.), § 407.

<sup>3</sup> 1 *Foster's Federal Practice* (2d ed.), § 356; *Catterall v. Purchase*, 1 Atk. 290. See, also, *Smith v. Clay*, Amb. 647; *Kenner v. Smith*, 8 Yerg. 206; *Payne v. Beech*, 2 Tenn. Ch. 708.

<sup>4</sup> *Miller v. Clark*, 52 Fed. Rep. 900, 903, where the court said that “in the cases of restitution cited there appears to have always been an erroneous judgment for a substantial sum.” The cases to which the court alluded as above and approved, but which it deemed inapplicable to the case in hand, were the following, furnished by the courtesy of the distinguished counsel for the complainant:—*Hornthal v. Collector*, 9 Wall. 560, 566; *Railroad Co. v. Grant*, 111 U. S. 387; *Bank of United States v. Washington Bank*, 6 Pet. 8; *N. W. Fuel Co. v. Brock*, 139 U. S. 216. See, further,

in the matter of restitution upon sustaining a bill of review, *Oats v. Chapman*, 1 Ves. Sr. 542; *Oats v. Chapman*, 2 Ves. Sr. 100; 2 Madd. 548, 579; 2 Bro. P. C. 24; 1 Ch. Cas. 42; 1 Ch. Rep. 139; 2 Ch. Rep. 48. In the case first cited in this note, *Miller v. Clark*, where a complainant appealed from a dismissal and payment of costs, and the mandate of the appellate court dismissing the appeal required the appellant to pay the costs of the appeal, and the costs in both courts were paid accordingly, it was held that upon sustaining a bill of review of the original decree on account of want of jurisdiction upon its face the court could not order restitution of the costs of the appellate court. In the exercise of its discretion the court also refused costs to the complainant on his bill of review.

<sup>5</sup> *Brinkerhoff v. Franklin*, 21 N. J. Eq. 384, 386, citing *Robson v. Cranwell*, 1 Dick. 61; *Kemp v. Squire*, 1

tion, and mere lapse of time will not prevent such action where there are no intervening rights; and such rights, if any, will be protected.<sup>1</sup> The application must be by petition and notice.<sup>2</sup> A final decree after enrolment and execution thereon,

Ves. Sr. 205; *Wright v. Wright*, 1 Ves. Sr. 326; *Hargrave v. Hargrave*, 8 Mac. & G. 348; *Wooster v. Woodhull*, 1 Johns. Ch. 539; *Miller v. Hild*, 8 Stockt. 25; *Beekman v. Peck*, 3 Johns. Ch. 415; *Millsbaugh v. MoBride*, 7 Paige, 509; *Tripp v. Vincent*, 8 Paige, 180; *Robertson v. Miller*, 2 Gr. Ch. 453; *Collins v. Taylor's Ex'rs*, 8 Gr. Ch. 163; *Carpenter v. Muchmore*, 15 N. J. Eq. 123. See, also, *Parker v. Dee*, 2 Ch. Cas. 200; *a. c.*, 3 Swanst., n. (a); *Day v. Allaire*, 81 N. J. Eq. 308; *Anon.*, 1 Vern. 181; *Wagner v. Blanchet*, 27 N. J. Eq. 356; *Enraght v. Fitzgerald*, 1 Dr. & War. 72; *Van Deventer v. Stiger*, 25 N. J. Eq. 224; *Fryer v. Davies*, L. R. 1 Ch. App. 390; *Gaskill v. Sine*, 18 N. J. Eq. 130. Where the facts are all before the court, application to vacate a decree or set aside an order may be made upon motion merely. It is not necessary to file a petition. *Collins v. Taylor*, 3 Gr. Ch. 163. In *Robertson v. Miller*, 2 Gr. Ch. 453, 454, the chancellor said: — "There is a clear distinction between a decree *nisi* for default, according to the English practice, and a final decree after an order that the bill be taken *pro confesso*, and reference to a master to take an account, according to our practice. Applications to open the one are treated with indulgence; attempts to set aside the other are more strictly scrutinized. . . . The whole current of authorities goes to show that there is a difference between decrees by default, orders that the bill be taken *pro confesso*, and actual decrees *pro confesso*. The last are considered, when compared with the

others, as sacred, and to be disturbed only for weighty reasons." See further as to opening decrees *pro confesso*, § 202 *et seq.*, *supra*. In North Carolina, where a party seeks to have a decree set aside upon the ground of irregularity in it, or in the proceedings in the action leading to it, the appropriate remedy is to move in the action within a reasonable time after the decree was granted to set it aside for such cause, and this is so although the action was ended. *Morris v. White*, 96 N. C. 91, 93, citing *Williamson v. Hartman*, 93 N. C. 236; *Fowler v. Poor*, 98 N. C. 466; *Burgess v. Kirby*, 94 N. C. 475; *Syme v. Trice*, 96 N. C. 243. The United States circuit courts have no power to set aside their decrees on motion after the term at which they were rendered. *Cameron v. McRoberts*, 8 Wheat. 591; *McMicken v. Perin*, 18 How. 507. And considerations of great hardship cannot vary the rule. *Austin v. Riley*, 55 Fed. Rep. 883.

<sup>1</sup> *Cawley v. Leonard*, 28 N. J. Eq. 467.

<sup>2</sup> *Jarmon v. Wiswall*, 24 N. J. Eq. 63. See, also, *Radley v. Shaves*, 1 Johns. Ch. 200. In *Beekman v. Peck*, 3 Johns. Ch. 415, a decree entered by default and enrolled was set aside on motion on payment of costs, the plaintiff having been previously served with notice of the motion and copies of the affidavits on which it was intended to be made. See, also, *Morris v. White*, 96 N. C. 91; *Collins v. Taylor*, 2 Gr. Ch. 163, cited in the preceding note.

and after a lapse of nearly three years from the date of the decree, was set aside for the purpose of correcting a plain and gross mistake in the master's report, although the defendant appeared and demurred to the complaint, and afterwards suffered a decree *pro confesso* to be taken against him and an *ex parte* report to be made by the master.<sup>1</sup>

§ 880. The same subject continued.—The court will not open a decree on the ground of surprise where a party has had notice of the suit and an opportunity of making his defense and has neglected to do so.<sup>2</sup> A final decree will not be opened to let in a defense where, from affidavits submitted, it appears that the evidence to sustain such defense would be insufficient to overcome that on which the decree was founded.<sup>3</sup> A decree will not be opened on the unsupported affidavit of

<sup>1</sup> Miller v. Rushforth, 4 N. J. Eq. 174.

<sup>2</sup> Miller v. Hild, 11 N. J. Eq. 25. Where a sheriff returns a subpoena "served," an affidavit of a defendant not denying that he was served with a ticket, but merely asserting that he believes he was served with an ordinary subpoena only, and that he had no knowledge or information that the bill prayed a decree for deficiency against him, is not sufficient to set aside such decree, regularly entered on a decree *pro confesso*. Mulford v. Reilly, 32 N. J. Eq. 419.

<sup>3</sup> Morris v. Hinchman, 32 N. J. Eq. 204. A decree will not be opened to let in a defendant to answer on account of the misapprehension of his solicitor where it is not shown that the petitioner has a meritorious defense. Vanderbeck v. Perry, 30 N. J. Eq. 78. See, also, page 868, n. 4, *infra*; Taylor v. Brown (Fla., 1898), 18 So. Rep. 957, holding that reasonable diligence and a meritorious defense are required. The same case holds that under the Florida equity rule, which is a copy of the United States equity rule (see §§ 270, 323, *supra*), a demurrer or plea lacking the affi-

davit of defendant and certificate of counsel, as required, is so fatally defective as not to preclude the entry at the proper time of a decree *pro confesso* for want of a plea, answer or demurrer. Where counsel do not disregard such a demurrer or plea, said the court, "but proceed to test its sufficiency in point of law by setting it down for argument, or making some motion for that purpose, and waive the requirements of the rule, the court will dispose of the question without reference to such requirements." In Keen v. Jordan, 18 Fla. 327, and Eldridge v. Wightman, 20 Fla. 687, continued the court, "it is said that a motion to strike the demurrer or plea from the files on account of the absent affidavit and certificate would be proper, but it is not said anywhere that counsel may not entirely disregard such a demurrer or plea." The United States Supreme Court has placed the same construction upon the federal equity rule. National Bank v. Insurance Co., 104 U. S. 54; Furnace Co. v. Witherow, 149 U. S. 574; §§ 270, 323, *supra*.

a defendant that the complainant verbally agreed not to prosecute the action.<sup>1</sup> A petition to open a decree, though sworn to, is no evidence of the facts contained in it. Its truth must be established by affidavits and other evidence taken according to the rules and practice of the court.<sup>2</sup> Where a person applies to the court to open its decree and permit him to become a party, he must excuse delay which appears to constitute laches on his part.<sup>3</sup>

**§ 881. Bills in the nature of bills of review.**—No persons except the parties and their privies or representatives can have a bill of review, strictly so called.<sup>4</sup> But other persons in interest and in privity of title or estate who are aggrieved by the decree, such as devisees and remainder-men, are entitled to maintain an original bill in the nature of a bill of review so far as their own interests are concerned.<sup>5</sup>

**§ 882. Supplemental bill in the nature of a bill of review.**—Where a decree in a suit supplementary in its nature to another suit ceases, irrespective of its merits, to have any

<sup>1</sup> *Marsh v. Lasher*, 18 N. J. Eq. 253. A decree and execution regularly obtained will not be set aside, unless upon satisfactory proof, not merely of vague understandings and of reasonable inferences, but of facts and circumstances which make it clearly inequitable and unjust that they should be enforced. *Terhune v. Colton*, 12 N. J. Eq. 812.

<sup>2</sup> *Carpenter v. Muchmore*, 15 N. J. Eq. 123. Where a defendant intentionally neglects to make a defense within the time prescribed by law, his application to set aside a final decree in order to let him in to defend is addressed to the extreme favor of the court, and will not be granted unless it rests in the clearest equity. *Boyn-ton v. Sandford's Ex'r*, 28 N. J. Eq. 184. A motion by an executor to set aside a final decree against him, so that he might set up as a defense that the action was prematurely brought, was denied where it

appeared that he intentionally neglected to make any defense within the time prescribed by law. *Boyn-ton v. Sandford's Ex'r*, 28 N. J. Eq. 184, 185.

<sup>3</sup> *Cannon v. Wright*, 49 N. J. Eq. 17, 22. Nine years after a bill was taken as confessed, and five years after a regular decree was made against all the defendants, it is too late to let in a part of such defendants to answer the bill and set up a meritorious defense. *Boyd v. Vanderkemp*, 1 Barb. Ch. 273. See, also, *Rogers v. Rogers*, 1 Paige, 188.

<sup>4</sup> § 872, *supra*.

<sup>5</sup> *Story's Equity Pleading* (10th ed.), § 409. "If a decree is made against a person who has no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest, relief may be obtained against error in the



foundation by reason of an adjudication in the main cause, the party interested may avail himself of the new matter by a supplemental bill in the nature of a bill of review, or for the purpose of suspending or avoiding the decree.<sup>1</sup>

**§ 883. Impeachment of decrees by infants.**— An infant defendant is as much bound by a decree in equity as a person of full age, and if an absolute decree be made against a defendant who is under age he will not be permitted to dispute it unless upon the same grounds as an adult might have disputed it, such as fraud, collusion or error.<sup>2</sup> To impeach a decree on the ground of fraud or collusion the infant may proceed either by a bill of review or supplemental bill in the nature of a bill of review; or he may so proceed by original bill.<sup>3</sup> He may

decree by a bill in the nature of a bill of review. Thus, if a decree is made against a tenant for life only, a remainder-man in tail or in fee cannot defeat the proceedings against the tenant for life but by a bill showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to and answer this new bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself or against any person under whom he claims, may be filed without the leave of the court." *Mitford's Pl.*, ch. 1, § 2, pt. 2.

<sup>1</sup> *Ballard v. Searls*, 180 U. S. 50. See *Mackall v. Richards*, 116 U. S. 45; *Alpaugh v. Wood*, 45 N. J. Eq. 153. In the case first cited plaintiff had obtained a decree for damages and taken out execution. In a subsequent suit between the same parties a decree was made setting aside certain conveyances of the defendant as fraudulent

and void. Thereupon plaintiff proceeded to levy his execution, and had sold part of the property when the decree in the original suit was reversed and the bill dismissed upon its merits. It was held that, though the sales under the execution might complicate the situation, they could not preclude the defendant from filing a supplemental bill in the nature of a bill of review to have the second decree suspended or avoided.

<sup>2</sup> *Loomer v. Wheelwright*, 3 Sandf. Ch. 135, 153; *Hurt v. Long* (Tenn.), 16 S. W. Rep. 968; *Woodall v. Moore*, 55 Ark. 22; *Matter of Acct. of Hawley*, 100 N. Y. 206, 211; *In re Tilden*, 98 N. Y. 484.

<sup>3</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 164; *Grimes v. Grimes* (Ill.), 32 N. E. Rep. 847. See, also, *Loyd v. Malone*, 28 Ill. 43; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Hess v. Voss*, 52 Ill. 478; *Gooch v. Green*, 102 Ill. 507; *Lloyd v. Kirkwood*, 112 Ill. 829; *Haines v. Hewitt*, 134 Ill. 276; *Franklin Sav. Bank v. Taylor*, 53 Fed. Rep. 854; *Taylor v. Franklin Sav. Bank*, 50 Fed. Rep. 289, 294; *Kingsbury v. Buckner*, 184 U. S. 650, case of a consent decree.

also impeach a decree on the ground of error by original bill<sup>1</sup> at any time before he attains his majority,<sup>2</sup> or afterwards within the time in which he could successfully prosecute an appeal or writ of error to reverse the erroneous decree.<sup>3</sup>

**§ 884. Original bills to impeach decrees for fraud.**— Courts of equity have the unquestioned power to give relief against judgments or decrees which were obtained by fraud, notwithstanding the fact that the suit as instituted has relation to frauds alleged to have been committed in a former suit in courts of another jurisdiction, State or national.<sup>4</sup> If a decree has been obtained by fraud it may be impeached by original bill,<sup>5</sup> sometimes called an original bill in the nature of a bill of review, without the leave of the court.<sup>6</sup> "And where a decree has been so obtained the court will restore

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 164; 8; Story's Equity Pleading § 426; Taylor v. Franklin Sav. Bank, 50 Fed. Rep. 289, 294, and cases cited. For a qualification of the rule when the rights of third parties are concerned see Lloyd v. Kirkwood, 112 Ill. 388; Franklin Sav. Bank v. Taylor, 58 Fed. Rep. 854.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 164; Grimes v. Grimes (Ill.), 82 N. E. Rep. 847.

<sup>3</sup> Grimes v. Grimes (Ill.), 82 N. E. Rep. 847.

<sup>4</sup> Ralston v. Sharon, 51 Fed. Rep. 702; Dobson v. Pearce, 12 N. Y. 165; Pearce v. Olney, 20 Conn. 544; Doughty v. Doughty, 27 N. J. Eq. 318; Dringer v. Railway, 42 N. J. Eq. 578; s. c., 8 Atl. Rep. 811; Yeatman v. Bradford, 44 Fed. Rep. 537; Daniels v. Benedict, 50 Fed. Rep. 353; Sahlgard v. Kennedy, 1 McCrary, 239; s. c., 2 Fed. Rep. 295; Gaines v. Fuentes, 92 U. S. 10; Barron v. Hunton, 99 U. S. 80; Johnson v. Waters, 111 U. S. 667; s. c., 4 S. Ct. Rep. 619; Arrowsmith v. Gleason, 129 U. S. 99; s. c., 9 S. Ct. Rep. 237; Marshall v. Holmes, 141 U. S. 597; s. c., 12 S. Ct. Rep. 62.

<sup>5</sup> Story's Equity Pleading (10th ed.), § 426; Mitford's Pl., ch. 1, § 2, pt. 8. An original bill in the nature of a bill of review lies only for fraud. Tilghman v. Werk (Ohio, 1889), 39 Fed. Rep. 680, 681; Davoue v. Fanning, 4 Johns. Ch. 199. A decree cannot be set aside for fraud upon petition. Story's Equity Pleading, § 426. In North Carolina it was said that "if the party complaining desires to attack the [decree] for fraud or the like, or any cause except irregularity, it is proper to do so by a new and independent action, only when and after the action in which it was given is completely terminated. Williamson v. Hartman, 92 N. C. 236; Fowler v. Poor, 93 N. C. 466. And if redress can be had in the action thus pending the court will not entertain a new action for the same purpose, but will dismiss it as having been unnecessarily and improvidently brought." Morris v. White, 96 N. C. 91, 93.

<sup>6</sup> Mitford's Ch. Pl., ch. 1, § 2, pt.

the parties to their former situation whatever their rights may be.”<sup>1</sup> A federal court has jurisdiction to set aside the decree of a federal court, irrespective of the citizenship of the parties to the new proceeding.<sup>2</sup> An original bill to set aside a decree for fraud ought ordinarily by analogy to be filed within the period required for suing out bills of review.<sup>3</sup> In order to justify the court of equity in annulling a decree on the ground of fraud, it must be made clearly to appear that the decree has no other foundation than the fraud charged, and that if there had been no fraud there would have been no decree.<sup>4</sup> A bill to set aside a decree for fraud, for error apparent, and for newly-discovered evidence, was pronounced multifarious.<sup>5</sup> All the parties to the original suit or their representatives must be joined as parties.<sup>6</sup> The bill must state the decree and the proceedings which led to it, with the circumstances of fraud on which it is impeached.<sup>7</sup> The prayer must be varied according to the nature of the fraud or improper means used, and the extent of their operation in obtaining an improper decision of the court.<sup>8</sup>

<sup>1</sup> Mitford's Pl., ch. 1, § 2, pt. 3.

<sup>2</sup> *Pac. R. Co. v. Missouri Pac. Ry. Co.*, 111 U. S. 506. See §§ 84, 85, *supra*. The federal court has jurisdiction of a suit between two aliens, the purpose of which is to impeach a decree in the same court; and in such a suit it has authority to make a decree on the merits. *Lacassaque v. Chapins*, 144 U. S. 119, 126.

<sup>3</sup> *Evaus v. Bacon*, 90 Mass. 213. See *Dunlevy v. Dunlevy*, 38 Fed. Rep. 462.

<sup>4</sup> *Dringer v. Receiver &c.*, 42 N. J. Eq. 573. The bill must show a mer-

itorious defense. *Kimberly v. Arms*, 40 Fed. Rep. 548; *a. c.*, 136 U. S. 629; *Taylor v. Brown (Fla.)*, 18 So. Rep. 957.

<sup>5</sup> *Kimberly v. Arms*, 40 Fed. Rep. 548. See page 853, n. 2, *supra*; § 875, *supra*.

<sup>6</sup> *Harwood v. Railroad Co.*, 17 Wall. 78. See, also, § 878, *supra*.

<sup>7</sup> *Story's Equity Pleading* (10th ed.), § 428.

<sup>8</sup> *Story's Equity Pleading* (10th ed.), § 428.

## CHAPTER XXVII.

### ENFORCEMENT OF DECREES.

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| <p>§ 885. Power to enforce decrees.<br/>886. Execution on decrees in the federal courts.<br/>887. Decisions on regularity and service of executions.<br/>888. Contempts—Power to punish.<br/>889. Power of the federal courts herein.<br/>890. Contempt proceedings in the federal courts.<br/>891. The same subject continued.<br/>892. Proceedings, how entitled.<br/>893. Order of commitment.<br/>894. Violation of injunctions.<br/>895. The same subject continued.<br/>896. Sequestration.</p> | <p>§ 897. Writ of assistance — Definition and use.<br/>898. Writ of assistance in the federal courts.<br/>899. Issuance of writ of assistance discretionary.<br/>900. Who may have a writ of assistance.<br/>901. Against whom a writ of assistance will issue.<br/>902. Proceeding to obtain writ of assistance.<br/>903. Bills to enforce decrees.<br/>904. The same subject continued.<br/>905. Power of court to control execution of decree.</p> |
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§ 885. Power to enforce decrees.— Formerly a decree in chancery, unless it was for land, operated only *in personam*; and the only mode of enforcing it was by what is termed process of contempt against the party disobeying it, by keeping him in prison until he finally complied with all the requirements of the decree. And when a disobedient party either could not be arrested on process of contempt, or having been arrested remained in prison without obeying the decree, the party entitled to the benefit of the decree might have a writ of sequestration to seize the defendant's personal property and the rents and profits of his real estate, and to keep him from the enjoyment of them till he had cleared his contempt,<sup>1</sup> in the same manner as in the case of a defendant who had committed a contempt by not appearing to and answering the bill.<sup>2</sup> And subsequently it became the practice to apply the money received by the sequestrators in satisfac-

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1082; Gibson's Suits in Chancery, § 619.      <sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 1082. See § 841, *supra*.

tion of the sum decreed to be paid.<sup>1</sup> These processes are now seldom resorted to, the courts of chancery being generally authorized to divest and vest title to the property, and to issue all writs for the collection of money or to obtain possession of real or personal property in use in the common-law courts.<sup>2</sup> But it is a general rule that courts of chancery have the power to issue all process that may be necessary to carry their decrees into actual execution.<sup>3</sup> And while the common-law writs and the statutory powers of divesting title are generally used instead of the process of attachment and writs of sequestration, the use of the latter, whenever the exigency requires, has not been altogether and everywhere superseded.<sup>4</sup>

§ 886. Execution on decrees in the federal courts.—A United States equity rule provides that “final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of *assumpsit*.”<sup>5</sup> Another equity rule provides for the enforcement of decrees for deficiency in foreclosure suits in the same manner.<sup>6</sup> The United States Revised Statutes provide that “all writs of execution upon judgments or decrees obtained in a circuit or district court, in any State which is divided into two or more districts, may run and be executed in any part of such State, but shall be issued from and made returnable to the court wherein the judgment was obtained;”<sup>7</sup> and “all writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one State may

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1032.

<sup>2</sup> See Gibson's Suits in Chancery, § 619. As to decrees divesting title to realty, see § 803, *supra*.

<sup>3</sup> 2 Daniell's Ch. Pr. (5th ed.) 1042, n. 7; Gibson's Suits in Chancery, § 619; 1 Barbour's Ch. Pr. 440; Ludlow v. Lansing, 1 Hopk. 231; Grew v. Breed, 12 Met. 363, 370, 371; White v. Hampton, 13 Iowa, 259; Jones v. Boston Mill Corp., 4 Pick. 509; Scott v. Jailer, 1 Grant's Cas. (Pa.) 237; Charles River Bridge v. Warren Bridge, 6 Pick. 395.

<sup>4</sup> They may be used in Tennessee. Gibson's Suits in Chancery, § 619, n. In Maryland the plaintiff in a money decree may have a *ca. sa.* and an attachment at the same time. Bryson v. Petty, 1 Bland, 183. The abolition of imprisonment for debt was held in Pennsylvania to forbid an attachment to enforce a money decree. Scott v. Jailer, 1 Grant's Cas. (Pa.) 237.

<sup>5</sup> Equity Rule 8.

<sup>6</sup> Equity Rule 92.

<sup>7</sup> U. S. R. S., § 985.

run and be executed in any other State, or in any Territory, but shall be issued from and made returnable to the court wherein the judgment was obtained.”<sup>1</sup>

**§ 887. Decisions on regularity and service of executions.—**

Where the statute allows the court of chancery to enforce its decree by execution, it is not necessary that the decree itself should contain an award of execution. The successful party is entitled to an execution as a matter of right, unless the decree itself prohibits the issuing of one.<sup>2</sup> In a contest between an execution on a judgment at law and an execution on a money decree in chancery, the writ first delivered to the sheriff and levied on the lands is entitled to priority.<sup>3</sup> In the New York court of chancery it was held that, where the delivery of possession is made a part of the decree of foreclosure and sale, a writ of execution of the decree is the proper remedy in case of disobedience.<sup>4</sup> Where a decree is against three defendants equally bound to pay, and an execution is directed against two of them only, they cannot complain because it is issued against them alone; for, if entitled to indemnity, they may have relief against their co-defendant for any amount they may be obliged to pay.<sup>5</sup> In New Jersey, where the person liable for a decree for deficiency in a foreclosure suit does not appear in the cause, it is the practice, after calculation of the amount, to award execution for the deficiency without notice of the motion.<sup>6</sup> It is irregular to make an execution returnable on Sunday. But in general the court will permit process thus defective to be amended in order to promote the purposes of justice.<sup>7</sup> Where an execution was set aside for irregularity, the court directed that the defendant should not be permitted to bring an action against the complainant or his solicitor for anything done under it.<sup>8</sup>

<sup>1</sup> U. S. R. S., § 986.

<sup>2</sup> *Otis v. Forman*, 1 Barb. Ch. 80.

<sup>3</sup> *Close v. Close*, 28 N. J. Eq. 473.

<sup>4</sup> *Kershaw v. Thompson*, 4 Johns. Ch. 609.

<sup>5</sup> *Ruckman v. Decker*, 28 N. J. Eq. 5.

<sup>6</sup> *White v. Zust*, 28 N. J. Eq. 108.

<sup>7</sup> *Boyd v. Vanderkemp*, 1 Barb. Ch. 273.

<sup>8</sup> *Boyd v. Vanderkemp*, 1 Barb. Ch.

273. It was held in the same case that where the defendant has been discharged under the bankrupt act, subsequent to a decree against him, for a debt which was provable under the act, it is irregular for the complainant to take out an execution against him without a previous application to the court for leave to do so.

§ 888. **Contempts — Power to punish.**— The exercise of the power belonging both to courts of common law and equity to compel obedience to decrees and orders has a twofold aspect: first, the punishment of the guilty party for his disrespect to the court; and second, to compel his performance of some act or duty required of him by the court which he refuses to perform. In the former case the court may judge for itself the nature and extent of the punishment with reference to the gravity of the offense. In the latter case the party refusing to obey should be fined and imprisoned until he performs the act required or shows that it is not in his power to do it.<sup>1</sup> An attorney who disobeys an order to pay over to his client money collected in a suit may be attached by the court in which the suit was brought and committed to jail for contempt.<sup>2</sup> It is a contempt to strike an attorney in the court-room, although the judge be not on the bench and the court be in recess, and although the cause of the assault has no relation to the proceeding in which the attorney is engaged.<sup>3</sup> It has been said to be a contempt of court to bring before it a collusive suit,<sup>4</sup> or to represent by words and by printed circulars that a sale under an execution is invalid, and that any purchaser will be involved in litigation.<sup>5</sup>

§ 889. **Power of the federal courts herein.**— The United States Revised Statutes provide that “the courts of the United States shall have power to punish by fine or imprisonment, at the discretion of the court, contempts of their authority; *provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions,<sup>6</sup> and the disobedience or resistance by any such officer,

<sup>1</sup> *In re Chilea*, 22 Wall. 157, 168.

<sup>2</sup> *Jeffries v. Laurie*, 27 Fed. Rep. 195.

<sup>3</sup> *United States v. Patterson*, 26 Fed. Rep. 509. See, further, for misbehavior in the presence of the court constituting a contempt, *Ex parte Terry*, 128 U. S. 289; *Sharon v. Hill*, 24 Fed. Rep. 726; *In re Terry*, 26 Fed. Rep. 419; *United States v. Emerson*,

4 Cranch, C. C. 188; *United States v. Carter*, 8 Cranch, C. C. 423.

<sup>4</sup> *Foster's Federal Practice* (2d ed.), § 841, citing *Lord v. Veazie*, 8 How. 251; *Cleveland v. Chamberlain*, 1 Black, 419.

<sup>5</sup> *In re Sowles*, 41 Fed. Rep. 752.

<sup>6</sup> See *Jeffries v. Laurie*, 27 Fed. Rep. 195; *Re Paschal*, 10 Wall. 483; *Bag-*

or by any party, juror, witness or other persons, to any lawful writ, process, order, rule, decree or command of the said courts."<sup>1</sup> The foregoing provision is a limitation upon the power of the courts,<sup>2</sup> but it is doubtful if it can affect the authority of the Supreme Court.<sup>3</sup> A United States equity rule provides that "if the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof."<sup>4</sup> It has been held that the power of the federal courts to punish for contempt and imprison for non-payment of money judgments is circumscribed and controlled by the laws of the State in such a measure that if a State law provides that proceedings cannot be had as for a contempt for the non-payment of money ordered by the court to be paid when the payment can be enforced by execution, and imprisonment for debt or non-payment of costs is abolished, a federal court in that State cannot enforce an order or decree which is substantially for the payment of money upon the theory that a disobedience is a contempt.<sup>5</sup> But the rule does not apply to proceedings against an attorney refusing to pay over money to his client collected for and belonging to him.<sup>6</sup> And a State statute regulating practice upon proceedings for contempt does not affect the practice in the federal courts.<sup>7</sup>

ley v. Yates, 1 McLean, 165; *Re Pitman*, 1 Curtis, 186.

<sup>1</sup> U. S. R. S., § 725.

<sup>2</sup> *Ex parte Robinson*, 19 Wall. 506.

<sup>3</sup> *Ex parte Robinson*, 19 Wall. 505, 510.

<sup>4</sup> United States Equity Rule 8.

<sup>5</sup> *Mallory Mfg. Co. v. Fox*, 20 Fed. Rep. 409. See § 608, *supra*.

<sup>6</sup> *Jeffries v. Laurie*, 27 Fed. Rep. 195; *In re Paschal*, 10 Wall. 491.

<sup>7</sup> *Fischer v. Hayes*, 6 Fed. Rep. 68. See §§ 6, 8, *supra*.



§ 890. Contempt proceedings in the federal courts.—United States equity rules provide that “the defendant shall be bound without further service to take notice” of the time prescribed in a decree for the performance of a specific act other than the payment of money,<sup>1</sup> and that “except in cases where personal or other notice is specially required or directed” an entry of an order in the order-book is sufficient notice thereof to the parties to the suit.<sup>2</sup> Personal service of a certified copy of a decree or order is the safer practice,<sup>3</sup> and it is also usual to give notice of an application for an attachment.<sup>4</sup> Although an equity rule provides that the clerk shall issue a writ of attachment against the delinquent party upon affidavit of the plaintiff filed in the clerk’s office;<sup>5</sup> a petition and rule for attachment is also a proper method to pursue in a proceeding for contempt in disobeying an order of court; and when a copy of such petition containing specific charges is served on the defendant, six days are sufficient in which to make answer thereto, or to ask for additional time in which to make such answer.<sup>6</sup> A person not a party in the cause who has obtained an order or in whose favor an order shall have been made may apply for attachment as if he were a party to the cause.<sup>7</sup>

§ 891. The same subject continued.—It has been held that a person charged with contempt, not committed in the presence of the court, may demand that interrogatories be filed touching the facts alleged to constitute the contempt, and that he cannot be punished, if he falsely deny the facts under oath, except by indictment for perjury.<sup>8</sup> Upon the argument of the motion for an attachment the court may determine the

<sup>1</sup> Equity Rule 8.

<sup>2</sup> Equity Rule 4.

<sup>3</sup> 1 Foster’s Federal Practice (2d ed.), § 842; *In re Cary*, 10 Fed. Rep. 622; *In re Lloyd*, 10 Beav. 451. See *Re Feeny*, 1 Hask. 804; s. c., N. B. R. [70] 238; *Skip v. Harwood*, 8 Atk. 564; *Hearn v. Tenant*, 14 Ves. 136; *People v. Brower*, 4 Paige, 405.

<sup>4</sup> *Worcester v. Truman*, 1 McLean, 438; *Fischer v. Hayes*, 6 Fed. Rep. 63. As to service of notice, see *Hol-*

*lingsworth v. Duane*, Wall. C. C. 141; *Eureka L. & Y. C. Co. v. Superior Court &c.*, 116 U. S. 410, 418; *Gray v. Chicago &c. R. Co.*, 1 Woolw. 63.

<sup>5</sup> Equity Rule 6.

<sup>6</sup> *American Const. Co. v. Jacksonville &c. Ry. Co.*, 52 Fed. Rep. 937.

<sup>7</sup> Equity Rule 10.

<sup>8</sup> *United States v. Dodge*, 2 Gall. 813; *Hollingsworth v. Duane*, Wall. C. C. 77. But see *Savin, Petitioner*, 131 U. S. 267.

questions of fact upon affidavits or refer the questions to a master.<sup>1</sup> On a motion for attachment against a railroad company and its officers for contempt in violating an injunction and an order appointing a receiver, an objection that the motion does not specify any person by name whom it is sought to attach cannot avail when such officers are well known to the court, have been served with a copy of the petition, have appeared in their official capacity and as counsel in litigation connected with the road, and when a proper order, if necessary, may be made from the record.<sup>2</sup>

§ 892. *Proceedings, how entitled.*—“In proceedings in equity between parties to a suit for contempt in not obeying the process of the court or any order or decree in the cause, the proceedings on the attachment may be, and usually are, entitled as in the original suit, though it is not irregular to entitle them in the name of ‘The People’ on the relation of the person prosecuting the attachment against the defendant or party proceeded against. When the attachment proceeding for a contempt is against a witness or a person not a party to the suit, the practice is to entitle the order for attachment, and all subsequent proceedings thereon, in the name of ‘The People’ on the relation,” etc.<sup>3</sup>

§ 893. *Order of commitment.*—The order of the court convicting a party of a contempt should recite the substance of the alleged misconduct, and that the defendant is guilty thereof,<sup>4</sup> and such order cannot be altered at a subsequent

<sup>1</sup> *Fischer v. Hayes*, 6 Fed. Rep. 68, holding that the amount of the fine may be settled in the same manner, upon principles prescribed by the court.

<sup>2</sup> *American Const. Co. v. Jacksonville &c. Ry. Co.*, 52 Fed. Rep. 937.

<sup>3</sup> Per Blatchfield, J., in *Fischer v. Hayes*, 6 Fed. Rep. 63. See *People v. Craft*, 7 Paige, 325; *United States v. Wayne*, Wall. C. C. 184. A complaint for contempt in disobeying an interlocutory order in equity is an incident to the principal action, and

should be filed in it, and not entered as a separate suit. *Winslow v. Nayson*, 118 Mass. 411. In proceedings as for a contempt against a party to the suit, to compel the appearance or answer of a defendant, or to enforce the performance of a decree or order, the affidavits and other proceedings, as well after as before the order for an attachment, are properly entitled in the original cause. *Stafford v. Brown*, 4 Paige, 360.

<sup>4</sup> *Gibson's Suits in Chancery*, § 873; *Fischer v. Hayes*, 6 Fed. Rep. 63.

term.<sup>1</sup> The order and *ruttimus* should specify particularly how long the contemner is to be imprisoned or what he is to do to entitle him to his discharge.<sup>2</sup> If he is committed upon a void order he may be discharged on *habeas corpus*,<sup>3</sup> but not where the order is merely irregular.<sup>4</sup> The court cannot discharge the party upon proof of his inability to comply with the order.<sup>5</sup> A decree is erroneous which directs that if an order contained in it be not complied with the sheriff shall imprison the party. To warrant a committal in such a case it is indispensable that there shall be some finding of the court that the party is in contempt, either on motion or by process of attachment.<sup>6</sup>

§ 894. Violation of injunctions.—An injunction granted in a case where the court has no jurisdiction of the parties and subject-matter is void and may be disobeyed with impunity;<sup>7</sup> but it is otherwise where the injunction is merely irregular or improvidently granted.<sup>8</sup> A defendant is bound by the injunction from the moment he learns of its existence, regardless of the means of information. Notice by letter, telegram, word of mouth, or other means, will be sufficient to put him in contempt for disobedience.<sup>9</sup> Neither the belief, mo-

<sup>1</sup> *Fiscner v. Hayes*, 6 Fed. Rep. 68.

<sup>2</sup> *Barbour's Ch. Pr.*, 279, 874; *Matter of Marsh, MacA. & M. (D. C.)*, 32.

<sup>3</sup> *Ex parte Fisk*, 113 U. S. 718; *Ex parte Terry*, 128 U. S. 289; *Gibson's Suits in Chancery*, § 878.

<sup>4</sup> *Savin, Petitioner*, 181 U. S. 267, 279; *Stevens v. Fuller*, 186 U. S. 468, 478.

<sup>5</sup> *Re Mullee*, 7 Blatchf. 28. See, as to the writ of attachment, *Braithwaite's Pr.* 159-161; and as to service of the writ, *United States v. Scholfield*, 1 Cranch, C. C. 180; *Davis v. Sherron*, 1 Cranch, C. C. 287; *Ex parte Burford*, 1 Cranch, C. C. 456; *Spafford v. Goodell*, 3 McLean, 97; *United States v. Scroggins*, 3 Woods, 529.

<sup>6</sup> *Sherwood v. Sherwood*, 32 Conn. 2.

<sup>7</sup> *Guebelle v. Epley (Colo. App.)*, 28

*Pac. Rep.* 89; *Smith v. People (Colo. App.)*, 2 Rob. 99; *Ex parte Fiske*, 118 U. S. 713, 718; *Calvert v. State*, 84 Neb. 616; *State v. Voorhies*, 87 La. Ann. 605.

<sup>8</sup> *People v. Van Buren*, 136 N. Y. 252; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *Green v. Griffin*, 95 N. C. 50; 1 *Beach on Injunctions*, § 247.

<sup>9</sup> *Gibson's Suits in Chancery*, § 821; *Baxter v. Washburn*, 8 Lea, 21; *Farnsworth v. Fowler*, 1 Swan (Tenn.), 1; *Boils v. Boils*, 1 Cold. (Tenn.) 284; *Toledo & C. R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 746; *People v. Barnes*, 7 N. Y. Supl. 802; *People v. Sturtevant*, 9 N. Y. 268; *Aldinger v. Pugh*, 57 Hun, 181; affirmed, 132 N. Y. 403; *Rochester R. Co. v. New York R. Co.*, 48 Hun, 190; *Koehler v. Farmers' Nat. Bank*, 6 N. Y. Supl. 470; affirmed, 117 N. Y.

tive nor intent with which the writ was issued will in any manner vary the responsibility of the party who violates it.<sup>1</sup> Even the advice of counsel is no excuse; it only makes another contemner.<sup>2</sup>

§ 895. **The same subject continued.**—The defendant is bound to obey the injunction in both its letter and its spirit, and must restrain his employees, servants, tenants, agents and attorneys if in his power to do so.<sup>3</sup> After a receiver of a railroad has been appointed, the collection by the vice-president of money due the company under a mail contract and depositing the same in bank to the company's credit, and attempting to dictate what disposition the receiver shall make of it, constitutes a contempt.<sup>4</sup> Where a decree prohibits the defendant from setting up "any claim" to certain property, it is a contempt to assert a different title or source of title held by him when the suit was brought from the one imputed to him in the suit and defended by him; and such an order is not limited to a prohibition of a suit in court; it is a contempt to assert title in such a way as to seriously embarrass the complainant in securing his rights as established by the decree.<sup>5</sup> No person can apply to the court to punish a party for a breach of an injunction, in the nature of a civil remedy, unless he has some interest in the subject-matter of the injunction, or has a right to prosecute for the breach thereof; except in

661. See, also, as to notice by telegraph, *Ex parte* Langley, L. R. 18 Ch. D. 110; *Cape May &c. R. Co. v. Johnson*, 85 N. J. Eq. 422; *Tankinson v. Cartledge*, 23 Alb. L. J. 123.

<sup>1</sup> Per Champlin, J., in *Wilcox &c. Plate Co. v. Schimmel*, 59 Mich. 524, citing *People v. Sturtevant*, 9 N. Y. 263; *Richards v. West*, 8 N. J. Eq. 456; *People v. Spalding*, 2 Paige, 326; *Commercial Bank v. Waters*, 10 Sm. & M. 552; *Monroe v. Harkness*, 1 Cranch, C. C. 157; *Mead v. Norris*, 21 Wis. 310; *Quackenbusch v. Van Riper*, 8 N. J. Eq. 350; *Romeyn v. Caplis*, 17 Mich. 449.

<sup>2</sup> *Gibson's Suits in Chancery*, § 821;

*Blair v. Nelson*, 8 Baxt. 1; *Lindsay v. Hatch* (Iowa), 52 N. W. Rep. 226; *Societe Anonyme v. Western Distilling Co.*, 43 Fed. Rep. 96.

<sup>3</sup> *Gibson's Suits in Chancery*, § 821; 1 *Beach on Injunctions*, § 251; *Poertner v. Russell*, 83 Wis. 193. As to what constitutes a violation of an injunction against an action at law, see *Pariente v. Bensusan*, 18 Sim. 522; *Mills v. Cobby*, 1 Mer. 8; *Clark v. Wood*, 6 N. J. Eq. 458; *In re Schwarz*, 14 Fed. Rep. 787; *German Savings Bank v. Hobel*, 80 N. Y. 873.

<sup>4</sup> *American Const. Co. v. Jacksonville &c. Ry. Co.*, 52 Fed. Rep. 937.

<sup>5</sup> *In re Chiles*, 23 Wall. 157, 167.

the case of infants, lunatics, etc.<sup>1</sup> To justify a commitment for violation of an injunction there must be clear evidence of an actual breach,<sup>2</sup> and an intention to violate an injunction is not punishable unless actually carried into effect.<sup>3</sup> Though an original decree contains a provision for further directions in the enforcement of it, the court cannot make a further order in the proceedings for contempt in disregarding the order contained in the decree. For such an order there must be proper application and proper notice to the parties concerned.<sup>4</sup>

§ 896. **Sequestration.**—The United States equity rules provide that whenever the marshal has returned *non est inventus* under a writ of attachment, a writ of sequestration may issue to compel obedience to a decree or order of the court.<sup>5</sup> The process of sequestration is a writ or commission, directed to certain persons, usually four, nominated by the complainant, empowering them to take possession of the defendant's real estate, and receive the rents and profits thereof; and to seize all his personal estate not exempt from execution, and to keep the same in their hands until the defendant shall have performed the decree and cleared his contempt.<sup>6</sup> If necessary, the court may order the sequestrators to sell the personal property; and if the delinquent be required by the order or decree to deliver to any person, or to deposit in court or elsewhere, books, papers, writings or any other articles or things, the sequestrators have power to seize them and hold them subject to the order of the court.<sup>7</sup> Sequestrators are officers of the court, and their duties and liabilities are substantially

<sup>1</sup> *Hawley v. Bennett*, 4 Paige, 163; *Diedrich v. People*, 87 Ill. App. 604; affirmed, 141 Ill. 665. See, also, *Secor v. Singleton*, 35 Fed. Rep. 376.

<sup>2</sup> *Harding v. Tingey*, 12 W. R. 685; *Dawson v. Paver*, 5 Hare, 424.

<sup>3</sup> *Grand Junction Canal Co. v. Dimes*, 18 L. J. Ch. 419. Where the defendant in violating an injunction is not guilty of wilful contempt, a nominal fine and costs will be imposed. *Morris v. Domestic Sewing Machine Co.*, 88 Fed. Rep. 482. Where a party is led to disobey an injunction

in a patent suit through a mistake as to the legal effect of a contract entered into by the complainant, he should not be punished as if guilty of wilful contempt of court, but should be discharged upon payment of costs. *Iowa Barb Wire Co. v. Southern B. W. Co.*, 39 Fed. Rep. 615.

<sup>4</sup> *In re Chiles*, 22 Wall. 157, 169.

<sup>5</sup> Equity Rules 7, 8. See § 841. *supra*.

<sup>6</sup> 2 Daniell's Ch. Pr. (5th ed.) 1050.

<sup>7</sup> 2 Daniell's Ch. Pr. (5th ed.) 1050-1057.

those of receivers.<sup>1</sup> The court will aid them, if necessary, by a writ of assistance or by process for contempt, when they are obstructed in the execution of their duties.<sup>2</sup> The writ is in the main a recital of the order for the sequestration; and the form of the writ must therefore be varied to meet the circumstances of each particular case.<sup>3</sup> The primary object of the sequestration is to compel the defendant to perform the decree, but the court may apply the proceeds of the sequestration to the satisfaction of the complainant's demand.<sup>4</sup> If either party die during the sequestration there must be a revivor, not only of the suit, but of the sequestration; and if the suit should be abated, the sequestration would be abated also.<sup>5</sup>

**§ 897. Writ of assistance — Definition and use.**— A writ of assistance is the ordinary process used by the court to put a party, receiver, sequestrator, or other person, into possession of property, when he is entitled thereto, either upon a decree or upon an interlocutory order.<sup>6</sup> Courts of equity have from the earliest times exercised the right to issue a writ of assistance in actions in equity brought for the purpose of determining the rights of the litigants to the title or possession of real estate after judgment declaring such rights, as well as in cases for the foreclosure or redemption of mortgages. In such cases the courts having jurisdiction of the persons and property in controversy have, after determining the rights of the parties litigant to the title or possession of real estate, rightfully assumed the power to enforce their judgments by the writ of assistance to transfer the possession instead of turning the party over to a court of law to recover such possession.<sup>7</sup>

<sup>1</sup> Gibon's Suits in Chancery, § 632.

<sup>2</sup> Daniell's Ch. Pr. (5th ed.) 1050-1057.

<sup>3</sup> Daniell's Ch. Pr. (5th ed.) 1051.

<sup>4</sup> Daniell's Ch. Pr. (5th ed.) 1056.

<sup>5</sup> Daniell's Ch. Pr. (5th ed.) 1059-1061.

<sup>6</sup> Gibon's Suits in Chancery, § 628; Daniell's Ch. Pr. (5th ed.) 1062; Payne v. Baxter, 2 Tenn. Ch. 518; Sharp v. Carter, 3 P. Wms. 875; Lord Pelham v. Duchess of Newcastle, 3 Swanst. 289, n.

<sup>7</sup> Roberdeau v. Rous, 1 Atk. 543;

Penn v. Lord Baltimore, 1 Ves. Sr.

444; 2 Eden on Injunctions (Water-

man's ed.), 425; Stribley v. Hawkie,

3 Atk. 275; Huguenin v. Baseley, 15

Ves. Jr. 180; Garretson v. Cole, 1

Har. & J. 887; Ruffin's Case, 18 N. H.

14; Devaucene v. Devaucene, 1 Edw.

Ch. 273; McKomb v. Kankey, 1

Bland, 868; Kershaw v. Thompson, 4

Johns. Ch. 610; Valentine v. Teller,

1 Hopk. Ch. 422; Diggle v. Boulden,

48 Wis. 477; Schenck v. Conover, 18

In the execution of the writ "the sheriff may take with him the *posse comitatus*, or power of the county, and may justify breaking open doors, if the possession be not quietly delivered. But if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of a door in the name of seisin is sufficient execution of the writ."<sup>1</sup>

§ 898. Writ of assistance in the federal courts.— A United States equity rule provides that "when any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court."<sup>2</sup> Another equity rule provides that "every person not being a party in any cause who has obtained an order, or in whose favor an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause."<sup>3</sup> Where, after a foreclosure sale, the court ordered the receiver to turn the property over to the assignee of the purchaser, it was held that the latter was entitled to a writ of assistance.<sup>4</sup>

§ 899. Issuance of writ of assistance discretionary.— The issuance of a writ of assistance rests in the sound discretion of the court,<sup>5</sup> which will be exercised only when the right is clear and where there is no equity or appearance of equity in the defendant, and where the sale and proceedings under the decree are beyond suspicion.<sup>6</sup> A purchaser who, by his con-

N. J. Eq. 220; *Stanley v. Sullivan*, 71 Wis. 585; *Terrell v. Allison*, 31 Wall. 289; *Irvine v. McBee*, 5 Humph. (Tenn.) 554; *Beatty v. De Forest*, 27 N. J. Eq. 482, 483; *Kessinger v. Whittaker*, 82 Ill. 22.

<sup>1</sup> *Hunter's Suits in Equity* (6th ed.), 168; *Blackstone's Com.*, 412.

<sup>2</sup> Equity Rule 9.

<sup>3</sup> Equity Rule 10.

<sup>4</sup> *Farmers' L. & T. Co. v. Chicago & A. Ry. Co.*, 44 Fed. Rep. 653. See, also, § 900, *infra*, and *Root v. Woolworth* (U. S., 1893), 14 S. Ct. Rep. 186, 188, cited in § 903, *infra*.

<sup>5</sup> *Schenck v. Conover*, 18 N. J. Eq.

220; *Blauvelt v. Smith*, 22 N. J. Eq. 31; *Barton v. Beatty*, 28 N. J. Eq. 412; *Vanmeter v. Borden*, 25 N. J. Eq. 414; *Van Hook v. Throckmorton*, 8 Paige, 38. But see *Beatty v. De Forest*, 27 N. J. Eq. 432, where it was said that after a sale in a foreclosure suit, and the purchaser has received his deed, a writ of assistance will go, *ex debito justitiæ* to put him in possession, and that the court "cannot refuse its aid . . . except on some reasonable ground of equity."

<sup>6</sup> *Blauvelt v. Smith*, 22 N. J. Eq. 31; *Vanmeter v. Borden*, 25 N. J. Eq.

duct subsequent to his purchase, leaves it doubtful whether he has not given the person in possession a right to hold the land, is not entitled to a writ of assistance.<sup>1</sup> The court will not interfere with nor attempt in cases of doubt to settle the rights of any party claiming possession by title paramount to that of the mortgagee or other party in whose favor the decree was made.<sup>2</sup> Where complainant foreclosed his mortgage and bought the property at the sheriff's sale, he was denied a writ of assistance against a party to the foreclosure proceedings against whom a decree *pro confesso* was taken, but who set up in opposition to the motion for a writ a title different from the one litigated in the suit and alleged to be superior to complainant's.<sup>3</sup> A writ of assistance under the Wisconsin statute<sup>4</sup> to put the purchaser in possession of land sold on execution will not be issued where there is a *bona fide* contest as to his right to the possession of the land under such sale, as where the defendant in good faith claims that the premises were his homestead and as such exempt from sale on execution.<sup>5</sup>

§ 900. Who may have a writ of assistance.—It is the practice of the court to put in possession by a writ of assistance a purchaser at a foreclosure sale when the person refusing to deliver possession was a party bound by the decree.<sup>6</sup>

414; *Barton v. Beatty*, 28 N. J. Eq. 412; *Schenck v. Conover*, 18 N. J. Eq. 220. See *Beatty v. De Forest*, 27 N. J. Eq. 482, 483, cited in the preceding note.

<sup>1</sup> *Barton v. Beatty*, 28 N. J. Eq. 412.

<sup>2</sup> *Thomas v. De Baum*, 14 N. J. Eq. 37; *Schenck v. Conover*, 18 N. J. Eq. 220; *Barton v. Beatty*, 28 N. J. Eq. 412. See, also, *Frelinghuysen v. Colden*, 4 Paige, 204.

<sup>3</sup> *Chadwick v. Island Beach Co.*, 42 N. J. Eq. 602.

<sup>4</sup> R. S. Wis., § 8025.

<sup>5</sup> *Stanley v. Sullivan*, 71 Wis. 585.

<sup>6</sup> *Chadwick v. Island Beach Co.*, 42 N. J. Eq. 602, 604; *Terrell v. Allison*, 21 Wall. 289; *Schenck v. Conover*,

13 N. J. Eq. 220; *Van Hook v. Throckmorton*, 8 Paige, 33. "In a strict foreclosure the practice is otherwise. In such case the court does not direct the mortgagor to deliver up the possession of the mortgaged premises to the plaintiff, but leaves the plaintiff to his ejectment. *Yates v. Hambly*, 2 Atk. 360; *Seaton's Decrees*, 146." *Schenck v. Conover*, *supra*. The purchaser must apply for the writ before the case is out of court. *Planters' Bank v. Fowlkes*, 4 Sneed, 461. But see comments on this case in *Johnson v. Tomlinson*, 13 Lea (Tenn.), 610. It is not necessary that the delivery of possession be made a part of the original decree. 1 *Barbour's Ch. Pr.*



By force of the federal equity rules an assignee of the purchaser may have a writ of assistance where such aid would be granted to the purchaser.<sup>1</sup> In Mississippi it was held that the chancery court may, upon the petition of the purchaser at a sale under a decree of that court, have a writ of assistance issued to put the grantee of such purchaser in possession of the land so bought, if such grantee, though not a party to the record, is entitled to possession as against him who has the possession;<sup>2</sup> and in New Jersey the sheriff may convey to

(2d ed.) 441. See, also, on the last point, *Root v. Woolworth* (U. S., 1898), 14 S. Ct. Rep. 136, 138.

<sup>1</sup> § 898, *supra*.

<sup>2</sup> *Gibson v. Marshall*, 64 Miss. 72, 75, where the court said:—"So far as we are advised the question has never been determined by any court of last resort in America. In *People v. Green*, 45 Cal. 97, it was decided that under a statute of that State giving the writ of assistance to the 'holder' of a tax-deed, the grantee of the purchaser was not entitled to invoke the writ, the court saying that 'holder' meant the grantee in the deed executed by the sheriff. In *City of San Jose v. Foster*, 45 Cal. 816, it was said that the statute only intended to confer the benefit of the writ on such persons as under the established rules of chancery practice would have been entitled to its aid if they claimed under the decree, and that because in chancery the writ would not run in favor of the grantee of a purchaser, so also ought the statutory writ to be denied to such person; but when in *Langley v. Voll*, 54 Cal. 435, the writ was asked by the grantee of a purchaser at a foreclosure sale, the court having decided that, being a stranger to the record, it could not be granted, it upon reconsideration withdrew so much of its opinion as decided that question, and, as relief

was denied upon another ground, expressly left the point open until a case should arise in which it should be necessary to a decision. In *Van Hook v. Throckmorton*, 8 Paige, 29, the chancellor said:—"There is no settled practice of this court entitling a purchaser from a purchaser at a master's sale, as a matter of right, to the assistance of the court to obtain possession of the premises which his grantor had purchased under the decree, and such assistance would not be given to him when there is, as in this case, a very strong probability that injustice would be done to the party in possession by such proceedings." In *Insurance Company v. Rand*, 8 How. Pr. 35, the Supreme Court held on this statement of the chancellor 'that in a plain case, where no injustice would be done the person in possession, the court had the power, and would exercise it in favor of a second purchaser.' According to the English practice it seems that the purchaser from the master was considered as a stranger, and, because he was, could not apply for the writ; but that if the complainant would apply for it for his benefit, it was a 'motion of course.' 2 Smith's Ch. Pr. 214. And at one time it was said in this State that the writ could not be applied for by the purchaser at the master's sale, because he was not a party to the rec-

the assignee of a purchaser of lands sold on execution at law or in equity, and such grantee is entitled to a writ of assistance.<sup>1</sup>

**§ 901. Against whom a writ of assistance will issue.**—A writ of assistance in aid of a purchaser at a master's sale will only be given against those persons who are parties to the foreclosure suit or who have come into possession of the premises subsequent to the commencement of the suit with the assent of the parties.<sup>2</sup> Upon the application of a purchaser at a foreclosure sale for a writ of assistance the court has no jurisdiction in a summary proceeding to determine the rights of third persons in possession of the premises under a claim of right which accrued previous to the filing of the bill of foreclosure.<sup>3</sup>

**§ 902. Proceeding to obtain writ of assistance.**—In putting a purchaser at a foreclosure sale into possession the mode of proceeding was formerly as follows: (1) A demand of possession by the purchaser of the tenant in possession, accompanied by an exhibit of the order from the sheriff or master;<sup>4</sup>

ord. *Wilson v. Polk*, 18 Sm. & M. 181. But in *Hayden v. Redus*, 48 Miss. 686, and *Jones v. Hooper*, 50 Miss. 510, it is said that the purchaser by his bid subjects himself to the jurisdiction of the court, and becomes a party to the suit so far as to enable him to move for confirmation of the sale or for the writ of assistance. In the latter case the court says:—"The authorities both in England and in this country are abundant, that the purchaser may petition in his own name. This being the rule in this State, we know of no reason why he may not invoke the writ, being a party to the cause, in aid of his grantee, just as under the ancient English practice the complainant might invoke it in aid of the purchaser."

<sup>1</sup>*Ekins v. Murray*, 29 N. J. Eq. 386.

<sup>2</sup>*Terrell v. Allison*, 21 Wall. 289; *Boynton v. Jackway*, 10 Paige, 307; *Blauvelt v. Smith*, 22 N. J. Eq. 81; *Van Hook v. Throckmorton*, 8 Paige, 38; *Howard v. Railway Co.*, 101 U. S. 837, 849; *Thompson v. Smith*, 1 Dill. 458; *Gelpcke v. Milwaukee & C. R. Co.*, 11 Wis. 454.

<sup>3</sup>*Frelinghuysen v. Colden*, 4 Paige, 204.

<sup>4</sup>*Schenck v. Conover*, 18 N. J. Eq. 220, 226; *Kershaw v. Thompson*, 4 Johns. Ch. 609. An order to deliver possession to the purchaser of mortgaged premises sold under a decree of foreclosure will be made only upon notice of the application and proof that the deed was shown to the tenant, that a demand of possession was made and that the tenant refused to comply. *Fackler v. Worth*, 18 N. J. Eq. 895.

(2) order to deliver possession; (8) injunction; (4) writ of assistance.<sup>1</sup> The injunction, as well as the attachment to enforce obedience to the order, is now disused.<sup>2</sup> In all cases the parties in possession and against whom the writ is applied for should have notice of the application and are entitled to be heard upon it.<sup>3</sup> Where, upon petition for a writ of assistance by a purchaser after a sale under a decree, the tenant puts in an answer setting up a defense and no replication is filed, the facts set up by way of defense must be taken as true.<sup>4</sup> After answering a petition for the writ and a hearing on the merits and an order granting the writ, a defendant therein cannot object for the first time in the appellate court to the form of the application for the writ.<sup>5</sup>

§ 903. Bills to enforce decrees.—Amongst the original and undoubted powers of a court of equity is that of entertaining a bill filed for enforcing and carrying into effect a decree of the same or of a different court, as the exigencies of the case or the interests of the parties may require.<sup>6</sup> “Sometimes from the neglect of the parties, or some other cause, it becomes impossible to carry a decree into execution without the further decree of the court. This happens generally in cases where, parties having neglected to proceed upon the decree, their rights under it become so embarrassed by a variety of subsequent events that it is necessary to have the decree of the court to settle and ascertain them. Sometimes

<sup>1</sup> *Schenck v. Conover*, 18 N. J. Eq. 220, 226; *Kershaw v. Thompson*, 4 Johns. Ch. 609.

<sup>2</sup> *Fackler v. Worth*, 18 N. J. Eq. 395; *Schenck v. Conover*, 18 N. J. Eq. 220, 226; *Valentine v. Teller*, Hopk. Ch. 422; 1 *Barbour's Ch. Pr.* (2d ed.) 441.

<sup>3</sup> *Blauvelt v. Smith*, 22 N. J. Eq. 81; *Fackler v. Worth*, 18 N. J. Eq. 395. See *Gelpcke v. Milwaukee &c. R. Co.*, 11 Wis. 454.

<sup>4</sup> *Thomas v. De Baum*, 14 N. J. Eq. 37.

<sup>5</sup> *Keil v. West*, 21 Fla. 508.

<sup>6</sup> *Shields v. Thomas*, 18 How. 253;

*Root v. Woolworth* (U. S., 1898), 14 S. Ct. Rep. 136, 138. The decree must have been final and not interlocutory. *McFadden v. McFadden*, 44 Cal. 806. When the rights of the parties to a suit, having its inception in a bill for an interpleader, have been determined by a final decree, the determination of the court may afterwards be enforced by the institution of new proceedings growing out of the original suit. Nor can the institution of these proceedings be prevented by the enrolment of the decree in the original suit. *Owings v. Rhodes*, 65 Md. 408.

such a bill is exhibited by a person who was not a party or who does not claim under any party to the original decree, but who claims in a similar interest, or who is unable to obtain the determination of his own rights till the decree is carried into execution. Or it may be brought by or against any person claiming as assignee of a party to the decree."<sup>1</sup> In a suit to remove a cloud upon title, a decree which establishes title in the complainant carries with it the right of possession as effectually as if it made specific provision to that effect, and a supplemental bill to effectuate the decree in favor of such complainant's privy in interest and estate may properly pray to have possession delivered up.<sup>2</sup> A federal court has jurisdiction, without regard to the citizenship of the parties, of a supplemental and ancillary bill, to carry into effect its own previous decree.<sup>3</sup> A bill for this purpose is generally partly an original bill and partly a bill in the nature of an original bill, although not strictly original; and sometimes it is likewise a bill of revivor, or a supplemental bill, or both. The frame of the bill is varied accordingly.<sup>4</sup>

§ 904. The same subject continued.—Where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill, and if the court be of opinion that it was erroneous it may refuse to execute it.<sup>5</sup> When the court enters a decree by consent, and aid in enforcing it is asked by a subsequent bill, it may refuse to be constrained by consent of the parties, and investigate

<sup>1</sup> Story's Equity Pleading (10th ed.), § 430, quoted and applied in *Root v. Woolworth* (U. S., 1898), 14 S. Ct. Rep. 186, 188. See, also, *Rylands v. Latouche*, 2 Bligh, 566; *Oldham v. Eboral*, C. P. Coop. t. Brough. 27; *Organ v. Gardiner*, 1 Ch. Cas. 231; *Lord Carteret v. Paschal*, 3 P. Wms. 197; *Binks v. Binks*, 2 Bligh, 593.

<sup>2</sup> *Root v. Woolworth* (U. S., 1898), 14 S. Ct. Rep. 186, 188.

<sup>3</sup> *Root v. Woolworth* (U. S., 1898), 14 S. Ct. Rep. 186; *Railroad Companies v. Chamberlain*, 6 Wall. 748. See, also, §§ 84, 85, *supra*.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 432.

<sup>5</sup> *Lawrence Mfg. Co. v. Janesville Mills*, 188 U. S. 552, 561, where the court said that "it would seem to devolve upon the plaintiff to show that the decree was a right decree;" *Gay v. Parpart*, 106 U. S. 672; *Lawrence v. Berney*, 2 Ch. Rep. 127; *O'Connell v. McNamara*, 3 Dru. & War. 411; *Hamilton v. Houghton*, 2 Bligh, 169; *White v. Baruther*, 1 Knapp, P. C. 179; *Wadhams v. Gay*, 78 Ill. 415; *Johnson v. Northey*, 2 Vern. 407; s. c., *Proc. in Ch.* 184; *Attorney-*

the merits of the case.<sup>1</sup> In a suit to quiet title the failure of the defendant to set up a prior recorded conveyance from the complainant to a third person of which the defendant had constructive notice precludes him from setting it up as a defense to a supplemental and ancillary bill brought for the purpose of carrying into effect the decree in the original suit when no reason is given for not setting it up in that suit.<sup>2</sup>

§ 905. The power of court to control execution of decree.—Notwithstanding the general rule that the court has no power whatever after final decree to amend, modify or alter the proofs of the decree, it retains and possesses the power of controlling the time of its execution.<sup>3</sup> Thus, pending an appeal without *superseas* from a decree of sale in a foreclosure suit settling the priority of liens and fixing a day for the sale, the court has power to postpone the sale if a sale on the day fixed would be oppressive or unjust.<sup>4</sup>

General v. Day, 1 Ves. 218; Wert v. Skip, 1 Ves. 218.

<sup>1</sup> Lawrence Mfg. Co. v. Janesville Mills, 188 U. S. 552.

<sup>2</sup> Root v. Woolworth (U. S., 1898), 14 S. Ct. Rep. 186.

<sup>3</sup> Bound v. South Carolina Ry. Co., 55 Fed. Rep. 186, 189.

<sup>4</sup> Bound v. South Carolina Ry. Co., 55 Fed. Rep. 186. See, also, to the same point, Monkhouse v. Corporation, 17 Ves. 380; Edwards v. Cunliffe, 1 Madd. 387, 389; Spann v. Spann, 2 Hill's Ch. Pr. 122. And as bearing upon the question, Alpaugh v. Wood, 45 N. J. Eq. 152.

## CHAPTER XXVIII.

### APPEALS AND APPELLATE PROCEDURE.

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| <p>§ 906. Review of decrees by appeal.</p> <p>907. The Evarts Act — Its purpose and scope.</p> <p>908. Appeals on the "question of jurisdiction" under the Evarts Act.</p> <p>909. Jurisdiction of constitutional questions under the Evarts Act.</p> <p>910. Final jurisdiction of circuit court of appeals — Certification and <i>certiorari</i>.</p> <p>911. Certification to the Supreme Court.</p> <p>912. <i>Certiorari</i> from the Supreme Court.</p> <p>913. "Final decisions" reviewable by the circuit court of appeals.</p> <p>914. Appeals from interlocutory injunctions.</p> <p>915. The same subject continued — Relief on appeal.</p> <p>916. The same subject continued — The conflicting decisions.</p> <p>917. The same subject continued — <i>Supersedeas</i>.</p> <p>918. Who may appeal — Appealable interest.</p> <p>919. The same subject continued.</p> <p>920. Jurisdictional amount.</p> <p>921. Appeals from joint decrees — Parties.</p> <p>922. Appeals by and against receivers.</p> <p>923. Appeals by purchasers at foreclosure sales.</p> <p>924. Appeals by interveners and petitioners to intervene.</p> <p>925. The same subject continued.</p> | <p>§ 926. Appeal by party accepting benefit of decree.</p> <p>927. Appeal by defendant after default at the hearing.</p> <p>928. Appeals from consent decrees.</p> <p>929. Appeals from orders granting or refusing an issue.</p> <p>930. Appeal upon question of costs.</p> <p>931. The same subject continued.</p> <p>932. Appeals in matters of discretion.</p> <p>933. The same subject continued — Illustrations.</p> <p>934. Matters of discretion further illustrated.</p> <p>935. Cross-appeals.</p> <p>936. Limitation of time for appeals — In the federal courts.</p> <p>937. Power to extend time for appeals.</p> <p>938. Appealable interlocutory decrees — In New Jersey.</p> <p>939. The same subject continued.</p> <p>940. What constitutes final appealable decrees — Generally.</p> <p>941. The same subject continued.</p> <p>942. The same subject continued — In Massachusetts.</p> <p>943. The same subject continued — New York court of chancery decisions.</p> <p>944. The same subject continued — In Virginia.</p> <p>945. Final decrees illustrated.</p> <p>946. The same subject continued.</p> <p>947. The same subject continued — Foreclosure sales.</p> <p>948. Final decree on a collateral matter.</p> |
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| <p>§ 949. Interlocutory decrees — Generally.</p> <p>950. Interlocutory decrees illustrated.</p> <p>951. The same subject continued.</p> <p>952. The same subject continued.</p> <p>953. The same subject continued — Injunction and account.</p> <p>954. Taking appeals in the federal courts.</p> <p>955. The same subject continued — Citation.</p> <p>956. Citation on appeals continued — Service and waiver.</p> <p>957. Amendment of petition of appeal.</p> <p>958. Security on appeal — In the federal courts.</p> <p>959. The same subject continued.</p> <p>960. The same subject continued — Approval of bond.</p> <p>961. The same subject continued — Appeals <i>in forma pauperis</i>.</p> <p>962. Return to writ of error or appeal in the federal courts — Transcript.</p> <p>963. <i>Certiorari</i> for diminution.</p> <p>964. Assignment of errors.</p> <p>965. The same subject continued.</p> <p>966. <i>Supersedeas</i> — Federal statute.</p> <p>967. Sufficiency of bond — Additional security.</p> <p>968. Damages on <i>supersedeas</i> bonds.</p> | <p>§ 969. The same subject continued — In foreclosure suits.</p> <p>970. Dismissal of appeals in the federal courts.</p> <p>971. The same subject continued.</p> <p>972. Burden of proving error.</p> <p>973. Review of findings of fact.</p> <p>974. Objections on appeal.</p> <p>975. The same subject continued.</p> <p>976. Objection of adequate remedy at law.</p> <p>977. Scope of appeal — Decisions on appeal.</p> <p>978. Decisions on appeal continued.</p> <p>979. Decision on appeal in specific performance.</p> <p>980. Erroneous rulings on evidence.</p> <p>981. Further evidence on appeals.</p> <p>982. Amendment of pleadings in appellate court.</p> <p>983. Rehearing of appeals — Federal decisions.</p> <p>984. The same subject continued.</p> <p>985. The same subject continued — Massachusetts decisions.</p> <p>986. The same subject continued — New Jersey decisions.</p> <p>987. The same subject continued — Indiana decisions.</p> <p>988. The same subject continued — Rule in Tennessee.</p> <p>989. Second appeals.</p> <p>990. The same subject continued.</p> |
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§ 906. Review of decrees by appeal.— Decrees of courts of equity, except where it is otherwise provided by statute, are reviewed by appeal and not by writ of error as in the case of judgments at law.<sup>1</sup> In the courts of the United States prior to the Evarts Act, to be noticed hereafter, an appeal could be taken only from a final decree, so that a case could not be brought to the appellate court in fragments.<sup>2</sup> The same rule obtains in some of the State courts,<sup>3</sup> while in some of the others

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1491.

<sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 998.

<sup>3</sup> *McLish v. Roff*, 141 U. S. 661; *Chicago & C. Ry. Co. v. Roberts*, 141 U. S. 690; *Forgay v. Conrad*, 6 How. 205.

appeals may also be taken from interlocutory orders and decrees. In the federal courts appeals are subject to the same rules, regulations and restrictions as are prescribed in cases of writs of error.<sup>1</sup>

**§ 907. The Evarts Act — Its purpose and scope.**— For the purpose of relieving the United States Supreme Court of “the oppressive burden of general litigation which impeded the examination and disposition of cases of public concern and delayed suitors in the administration of justice,”<sup>2</sup> congress passed an act approved March 3, 1891,<sup>3</sup> entitled “An act to establish circuit courts of appeal, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.”<sup>4</sup> It is commonly styled the Evarts Act, after the eminent jurist and statesman who had charge of the bill. It “provides for the distribution of the entire appellate jurisdiction of our national judicial system between the Supreme Court of the United States and the circuit court of appeals therein established, by designating the classes of cases in respect of which each of those two courts shall respectively have final jurisdiction.”<sup>5</sup>

<sup>1</sup> U. S. R. S., § 1012.

<sup>2</sup> *In re Woods*, 148 U. S. 202, 205; *Lau Ow Bew v. United States*, 144 U. S. 55.

<sup>3</sup> 26 U. S. Stat. at L., ch. 517, pl. 826 *et seq.*

<sup>4</sup> The full text of the act is published in the appendix to this work. In this and the following sections such parts of the act as are specifically referred to are quoted *verbatim* for the convenience of the reader. Section 4 of the act, which transfers the appellate jurisdiction of the circuit court to the circuit court of appeals, gives the latter court jurisdiction of an appeal by an assignee in bankruptcy from an order of the district court allowing a claim of a creditor under United States Revised Statutes, section 4980. *Duff v. Carrier* (C. C. A.), 55 Fed. Rep. 438.

<sup>5</sup> *Lau Ow Bew v. United States*, 144

U. S. 47, 56; *McLish v. Roff*, 141 U. S. 661; *Badaracco v. Cerf*, 53 Fed. Rep. 169; *Louisville Pub. Warehouse Co. v. Collector* (C. C. A.), 49 Fed. Rep. 561, 565. “The policy of the law in the creation of this court shows marked liberality in allowing appeals from trial courts in all cases, and on the other hand requires a speedy prosecution of all appeals or writs of error.” *McCormick, C. J.*, in *Warner v. Texas & C. Ry. Co.* (C. C. A.), 54 Fed. Rep. 920, 921. See, further, in respect of the remedial nature of the act, § 914, *infra*. The act took effect immediately, so that appeals might be taken to the circuit court of appeals at once, and although such causes involving less than \$5,000 were not previously reviewable in any court. § 23, n. 1, at p. 31, *supra*; *The Alijandro* (C. C. A.), 56 Fed. Rep. 621.



§ 908. Appeals on the "question of jurisdiction" under the Evarts Act.—Section 5 of the Evarts Act provides as follows:—"§ 5. Appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:—In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." By the "court below" is not meant the circuit court of appeals.<sup>1</sup> When a plea to the jurisdiction of the circuit court has been overruled the case must proceed to final decree upon the merits before any appeal can be taken on the jurisdictional question, the appellant then having the right to go to the Supreme Court on the question of jurisdiction or to bring the entire case before the circuit court of appeals.<sup>2</sup> Where the circuit court entered a decree in accordance with the mandate of the circuit court of appeals it was held that no appeal would lie to the Supreme Court on the question of jurisdiction. "If the circuit court of appeals erred, or if for any reason its judgment could be held void, the proper remedy lay in a *certiorari* from [the Supreme Court] to that court."<sup>3</sup> The question of the jurisdiction of the circuit court in foreclosure proceedings cannot be considered in the circuit court of appeals where the only decision given and order made below was on an application for an injunction to restrain proceedings in the State court concerning the same subject-matter, as in such case the foreclosure is still pending in the circuit court.<sup>4</sup> Where the Supreme Court decides that the circuit court has jurisdiction of a cause and remands the same to that court for the taking of an account, the circuit court of appeals cannot on a subsequent appeal reopen the question of jurisdiction.<sup>5</sup> Upon an appeal from a final decree the circuit court of appeals has jurisdiction to determine whether the question of the jurisdic-

<sup>1</sup> *Barling v. Bank* (C. C. A.), 50 Fed. Sup. Ct. Rep. 4, 6; *American Const. Co. v. Pennsylvania Co.*, 148 U. S. 372. Rep. 260.

<sup>2</sup> *Gates v. Bucki* (C. C. A.), 53 Fed. Rep. 961, following *McLish v. Roff*, 141 U. S. 661; s. c., 12 Sup. Ct. Rep. 118.

<sup>3</sup> *Nashua &c. Corp. v. Boston &c. Corp.* (C. C. A.), 51 Fed. Rep. 929.

<sup>4</sup> Per Fuller, C. J., in *Aspen Min. & Smelting Co. v. Billings* (U. S.), 14 See, also, *Clark v. Keith*, 106 U. S. 464.

tion of the court below is the sole question or but one of many questions involved in the decree.<sup>1</sup> And the fact that the circuit court has no jurisdiction is no ground for dismissing an appeal for want of jurisdiction in the appellate court; the proper remedy is by reversal of the judgment.<sup>2</sup> If one party brings a case into the circuit court of appeals upon the merits of the controversy, and pending proceedings therein the other party takes the case from the court below to the Supreme Court upon the question of jurisdiction, the latter proceeding does not defeat the right of the circuit court of appeals to hear and determine the case; but it may be continued to await the decision of the Supreme Court upon the question of jurisdiction.<sup>3</sup>

**§ 909. Jurisdiction of constitutional questions under the Evarts Act.**—Section 5 of the Evarts Act, defining the appellate jurisdiction of the Supreme Court, concludes as follows:<sup>4</sup>—“From the final sentences and decrees in prize cases. . . . In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.<sup>5</sup> In any case in which the constitution or law of a State is claimed to be in contravention of the constitution of the United States.”<sup>6</sup> The circuit court of appeals has no jurisdiction to review a decision which involves the construction or application of the constitution of the United States, or in which a State law is claimed to be in contravention thereof.<sup>7</sup>

**§ 910. Final jurisdiction of circuit court of appeals — Certification and certiorari.**—Section 6 of the Evarts Act

<sup>1</sup>Crabtree v. Madden (C. C. A.), 54 Fed. Rep. 426; Crabtree v. Byrne (C. C. A.), 54 Fed. Rep. 432.

<sup>2</sup>Nashua &c. Corp. v. Boston &c. Corp. (C. C. A.), 51 Fed. Rep. 929, and cases cited.

<sup>3</sup>Northern Pac. R. Co. v. Glaspell (C. C. A.), 49 Fed. Rep. 482. Where a defendant in a criminal case in the district court applied for a writ of error to the circuit court of appeals from the overruling of a motion to arrest judgment on the ground of

want of jurisdiction, the circuit court of appeals held that it had no jurisdiction to grant the application. United States v. Sutton, 47 Fed. Rep. 129.

<sup>4</sup>The preceding part of the section is quoted in § 908, *supra*.

<sup>5</sup>See §§ 24, 25, *supra*.

<sup>6</sup>26 U. S. Stat. at L., ch. 517, § 5, p. 827.

<sup>7</sup>Hamilton v. Brown (C. C. A.), 53 Fed. Rep. 753.

provides that the circuit court of appeals "shall exercise appellate jurisdiction to review, by appeal or by writ of error, final decisions in the district court<sup>1</sup> and the existing circuit courts in all cases other than those provided for in the preceding section of this act,<sup>2</sup> unless otherwise provided by law;<sup>3</sup> and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy as if it had been brought there for review by writ of error or appeal; and excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."<sup>4</sup>

§ 911. Certification to the Supreme Court.—It is only questions of gravity and importance which the circuit court

<sup>1</sup> See *United States v. Gee Lee*, 50 Fed. Rep. 271.

<sup>2</sup> See §§ 21, 908, 909, *supra*.

<sup>3</sup> See § 23, n. 4, *supra*. *Lau Ow Bew v. United States*, 144 U. S. 47, 56, there cited, is followed on the same point in *Louisville Pub. Warehouse Co. v. Collector (C. C. A.)*, 49 Fed. Rep. 561, 565.

<sup>4</sup> U. S. Stats. at L., ch. 517, § 6. "Thus, in the interest of jurisprudence and uniformity of decision, the supervision of this court, by way of advice or direct revision, is secured." Per Chief Justice Fuller in *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 268.

of appeals should certify to the Supreme Court for instruction.<sup>1</sup> The question as to the jurisdiction of the circuit court may be certified to the Supreme Court by the circuit court of appeals, but it will not exercise the power to do so in a plain case.<sup>2</sup> Where a district judge who is assigned to hold a term of the circuit court of appeals is disqualified to pass upon the questions involved in a pending cause by reason of having heard them in the court below, and the circuit judge also is perhaps disqualified by reason of having decided a similar question in another case, and there is a case already pending on appeal in the Supreme Court which is incidentally connected with the case in hand, so that both may probably be argued together, the court will certify the questions arising in the case to the Supreme Court.<sup>3</sup> The act does not contemplate that questions or propositions of law shall be propounded and the entire record thereupon transmitted for the Supreme Court to answer such questions or propositions in view thereof. It is for the Supreme Court to determine whether upon a proper certificate it will answer the questions as propounded or direct the whole record to be placed before it in order to decide the matter in controversy in the same manner as if the case had been brought up by writ of error or appeal.<sup>4</sup> A certificate by the circuit court of appeals is irregular when a quorum of its members does not sit in the case.<sup>5</sup> A Supreme Court rule provides that the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.<sup>6</sup> A certificate which does not specifically set forth the question or questions to be answered, nor state that instruction is desired for the proper decision of such question or questions, is essentially defective.<sup>7</sup> While

<sup>1</sup> *Lau Ow Bew, Petitioner*, 141 U. S. 583.

<sup>2</sup> *Barling v. Bank* (C. C. A.), 50 Fed. Rep. 260; *McLish v. Roff*, 141 U. S. 668.

<sup>3</sup> *Farmers' & Merchants' State Bank v. Armstrong* (C. C. A.), 49 Fed. Rep. 900.

<sup>4</sup> *Cincinnati & C. R. Co. v. McKeen*, 149 U. S. 259, 261; *Farmers' & Merchants' State Bank v. Armstrong* (C. C. A.), 49 Fed. Rep. 600.

<sup>5</sup> *Cincinnati & C. R. Co. v. McKeen*, 149 U. S. 259.

<sup>6</sup> Supreme Court Rule 87; 189 U. S. 706; *Cincinnati & C. R. Co. v. McKeen*, 149 U. S. 259, a case of insufficient compliance with the rule. In such a case the cause is dismissed.

<sup>7</sup> *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 269, where the text of the defective certificate is recited. In that case Chief Justice Fuller said:—"It was long ago settled,

the fact that the circuit court of appeals for one circuit has rendered a different judgment from that of the circuit court of appeals for another, under the same conditions, might furnish ground for a *certiorari* on proper application, the assertion of the existence of such difference, and of the wish that it might be determined by the Supreme Court, is not equivalent to the expression of a desire for instruction as to the proper decision of a specific question or questions requiring determination in the proper disposition of the particular case. "The difference can only exist when the courts have actually reached contradictory results, but each must proceed to its own judgment, unless such grave doubts arise as to induce the conviction that [the Supreme Court] should be resorted to for their solution in the manner provided for."<sup>1</sup>

**§ 912. Certiorari from the Supreme Court.**—"A *certiorari* will only be issued where questions of gravity or importance are involved or in the interest of uniformity of decision;"<sup>2</sup> and the "jurisdiction should be exercised sparingly and with great caution."<sup>3</sup> "The fact that the circuit court of appeals for one circuit has rendered a different judgment from that of the circuit court of appeals for another, under the same conditions, might furnish ground for a *certiorari* on proper application."<sup>4</sup>

under the statutes authorizing questions upon which two judges of the circuit court were divided in opinion to be certified to this court, that each question so certified must be a distinct point or proposition of law clearly stated, so that it could be definitely answered. *Perkins v. Hart*, 11 Wheat. 287; *Sadler v. Hoover*, 7 How. 646; *Jewell v. Knight*, 128 U. S. 426, 432; *Fire Ins. Assoc. v. Wickham*, 128 U. S. 426; and that if it appeared upon the record that no division of opinion actually existed among the judges of the circuit court, this court would not consider a question as certified even though it were certified in form. *Railroad Co. v. White*, 101 U. S. 98; *Webster v.*

*Cooper*, 10 How. 54; *Nesmith v. Sheldon*, 6 How. 41."

<sup>1</sup> Per Chief Justice Fuller in *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 270.

<sup>2</sup> Per Chief Justice Fuller in *Lau Ow Bew v. United States*, 144 U. S. 47.

<sup>3</sup> Per Chief Justice Fuller in *Lau Ow Bew, Petitioner*, 141 U. S. 583, 589, in which case a writ of *certiorari* was issued, the question involved being deemed of great moment. In *In re Woods, Petitioner*, 148 U. S. 202, 206, a *certiorari* was refused, the inquiry not falling within the category of questions of "gravity and general importance."

<sup>4</sup> Per Chief Justice Fuller in *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 270.

The Supreme Court may issue a *certiorari* to bring up the whole case, whether its advice is requested or not,<sup>1</sup> but it cannot issue a *certiorari* to bring up a case of which it has appellate jurisdiction by appeal or writ of error.<sup>2</sup> A Supreme Court rule provides that "where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant as part of the application."<sup>3</sup>

§ 913. "Final decisions" reviewable by the circuit court of appeals.—The words "final decision" in section 6 of the Evarts Act<sup>4</sup> have the same meaning as "final decree" or "final judgment;" and what would be a final decree under the old system, and therefore reviewable by the Supreme Court, falls within the jurisdiction of the circuit court of appeals.<sup>5</sup> An order of the circuit court remanding a cause to a State court is not a final decision from which an appeal will lie.<sup>6</sup> But a decision of a circuit court on a petition of intervention in a foreclosure suit sustaining the intervener's claim is a final decision.<sup>7</sup> And where parties are entirely dismissed from a cause by a decree, it is final and authorizes an immediate appeal, although other matters are retained in which they as parties have no interest.<sup>8</sup>

<sup>1</sup> *Lau Ow Bew*, 144 U. S. 47.

<sup>2</sup> *Lau Ow Bew*, 144 U. S. 47.

<sup>3</sup> Supreme Court Rule 37; 139 U. S. 706.

<sup>4</sup> § 910, *supra*.

<sup>5</sup> *Duff v. Carrick* (C. C. A.), 55 Fed. Rep. 433, 435; *Brush Electric Co. v. Electric Imp. Co.* (C. C. A.), 51 Fed. Rep. 557. See §§ 940, 941, 945 *et seq.*, *infra*.

<sup>6</sup> *In re Coe* (C. C. A.), 49 Fed. Rep. 481; *McLish v. Roff*, 141 U. S. 661; *Railway Co. v. Roberts*, 141 U. S. 690.

<sup>7</sup> *Central Trust Co. v. Marietta & C. Ry. Co.* (C. C. A.), 48 Fed. Rep. 850, 860, where *Pardee, J.*, said:—"While perhaps the court may for its own protection hereafter be compelled to

insist that cases pending in the circuit court and district courts shall not be brought to this court for review piecemeal, we are not inclined to enforce such a rule in this case, even if we have authority to do so."

<sup>8</sup> *Grant v. East & West R. Co.* (C. C. A.), 50 Fed. Rep. 795, distinguishing *Iron Co. v. Martin*, 132 U. S. 91, and the cases there cited; *Hill v. Railroad Co.*, 140 U. S. 52. The views of the circuit court of appeals as to what decrees in equity should be considered final were quite fully expressed in the case first cited and in *Dufour v. Lang*, 54 Fed. Rep. 918. For other cases in that court upon

§ 914. Appeals from interlocutory injunctions.—Section 7 of the Evarts Act<sup>1</sup> provides that “where upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted, or continued by an interlocutory order or decree in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals. Provided that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.”<sup>2</sup> The act introduces a new feature of equity practice in the United States courts, and “being of a highly remedial nature it ought to be construed so as to give full force to the intention of the law-maker.”<sup>3</sup> The term “interlocutory order or decree” is used “in its common and well-understood sense, and as intending the line of distinction accepted and interpreted by the federal courts; and it follows that all injunction orders and decrees which were interlocutory, and not final, within the meaning of the old statute,<sup>4</sup> and for that reason not appealable, are interlocutory under the new statute,” and therefore appealable.<sup>5</sup> An order at the prayer of one party that all further proceedings in the cause shall be stayed until the fur-

the subject see *Potter v. Beal*, 50 Fed. Rep. 860; *City of New Orleans v. Peake*, 52 Fed. Rep. 74.

<sup>1</sup> 26 U. S. St. at L. 828.

<sup>2</sup> 26 U. S. St. at L. 828, § 7.

<sup>3</sup> *Dudley E. Jones Co. v. Munger & Co.*, 1 C. C. A. 668; s. c., 50 Fed. Rep. 785 (modifying s. c., 49 Fed. Rep. 61), where it was held too late to question the jurisdiction after the cause was submitted on the merits without objection. The mischief which the act was designed to remedy is admirably stated in the brief of the distinguished counsel for the appellant in *Richmond v. Atwood* (C. C. A.), 52

Fed. Rep. 10, 14–19. In the same case (at p. 20) Aldrich, D. J., states the policy which it was intended to emphasize.

<sup>4</sup> U. S. R. S., § 692, providing for appeals to the Supreme Court.

<sup>5</sup> Per Aldrich, D. J., in *Richmond v. Atwood* (C. C. A.), 52 Fed. Rep. 10, 22. A docket entry containing only the words, “Opinion — Decree for complainants,” does not constitute a decree for an injunction, nor can it be aided by reference to the opinion. *Herrick v. Cutcheon* (C. C. A.), 55 Fed. Rep. 6, dismissing an appeal founded on such an entry as premature.

ther order of the court is appealable under the section in question.<sup>1</sup> So it was held that an appeal lies from a decree which is rendered after full hearing on the merits, sustaining the validity of a patent, declaring infringement, and awarding a perpetual injunction and an accounting.<sup>2</sup>

**§ 915. The same subject continued — Relief on appeal.—**

It was the practice from an early period in the English House of Lords to direct a final disposition of causes before it with a full record, upon appeal from interlocutory orders and decrees based upon a hearing on the merits below, whenever it was found that there was no equity in the complainant's cause.<sup>3</sup>

<sup>1</sup> *Pennsylvania Co. v. Jacksonville &c. Ry. Co.*, 55 Fed. Rep. 131. "It may be doubted whether we can be given jurisdiction upon injunction purely nominal, concurrent with proceeding before a master, . . . or the appointment of a receiver, or the impounding of papers or moneys pending litigation, if as effectual without injunction as with it." *Putnam. C. J.*, in *Potter v. Beal* (C. C. A.), 50 Fed. Rep. 860, 863.

<sup>2</sup> *Richmond v. Atwood* (C. C. A.), 52 Fed. Rep. 10, where *Aldrich, C. J.*, said:—"We think the term 'interlocutory order or decree' was used in its broadest sense, and that the purpose of congress was to confer the right of appeal from any decree or order granting an injunction, at any stage of the proceeding, whether technically preliminary, interlocutory or final." Appeals from injunctions in patent cases were also sustained in *Dudley E. Jones Co. v. Munger*, 50 Fed. Rep. 785; s. c., 1 C. C. A. 668, and other cases cited in notes to the next section but one. An appeal cannot be taken from an order denying a petition for rehearing and dissolution of the injunction. *Boston &c. R. Co. v. Pullman's Palace Car Co.* (C. C. A.), 51 Fed. Rep. 305. In the following cases (cited in the

brief of counsel for the appellant in *Richmond v. Atwood*, *supra*), a decree at final hearing ordering an injunction and referring the case to a master for an accounting was expressly spoken of as an "interlocutory decree," as distinguished from the "final decree" based on the master's report:—*Magowan v. Packing Co.*, 141 U. S. 332-337; s. c., 12 S. Ct. Rep. 71; *McCreary v. Canal Co.*, 141 U. S. 459, 460; s. c., 12 S. Ct. Rep. 40; *St. Germain v. Brunswick*, 135 U. S. 227, 228; s. c., 10 S. Ct. Rep. 822; *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342-344; s. c., 10 S. Ct. Rep. 884; *Cornely v. Mackwald*, 181 U. S. 159, 160; s. c., 9 S. Ct. Rep. 514; *Hurlbut v. Schillinger*, 120 U. S. 456-458; s. c., 9 S. Ct. Rep. 584; *McCormick v. Graham's Adm'r*, 129 U. S. 1, 2; s. c., 9 S. Ct. Rep. 213; *Brewing Co. v. Gottfried*, 128 U. S. 158-163; s. c., 9 S. Ct. Rep. 83. See, also, *Barnard v. Gibson*, 7 How. 650; *Humiston v. Stainthorp*, 2 Wall. 106; *Perkins v. Fourniquet*, 14 How. 818-823; *Saddle Co. v. Smith*, 33 Fed. Rep. 414, 416.

<sup>3</sup> *Richmond v. Atwood* (C. C. A.), 52 Fed. Rep. 10, 26; *Le Guen v. Gouverneur*, 1 Johns. Cas. 486. And the action of the appellate court in this respect was not confined to



The same rule prevailed in the New York court of appeals prior to the adoption of the code;<sup>1</sup> and likewise in New Jersey "the general rule is that the appellate court will render such judgment as the inferior court, under all the circumstances, should have given."<sup>2</sup> Whether the United States circuit court of appeals has jurisdiction upon an appeal from an interlocutory decree granting an injunction to adjudge the merits of the case is not settled.<sup>3</sup>

§ 916. The same subject continued — The conflicting decisions.—It is a troublesome question whether the circuit court of appeals, when the whole record is before it upon an appeal from an interlocutory order or decree granting or continuing an injunction, has the power not only to correct the error in granting the injunction, but also to afford complete relief by disposing of the case in the manner in which it should have been disposed of in the court below. It has been held that the court, even with the consent of the parties, cannot properly pronounce any final judgment or decree on the merits of the controversy upon the appeal in a patent case;<sup>4</sup>

causes in which it concurred with the chancellor from whom the appeal was taken, but extended to instances where the findings were reversed upon an examination of the record. *Governors &c. v. Swan*, 5 Bro. P. C. 429; *Ellis v. Segrave*, 7 Bro. P. C. 381; *Bouchier v. Taylor*, 4 Bro. P. C. 708; *White v. Lightburne*, 4 Bro. P. C. 181; *Attorney-General v. Wall*, 4 Bro. P. C. 665; *Scribblehill v. Brett*, 4 Bro. P. C. 144; *McCan v. O'Ferrall*, 8 Clark & F. 80.

<sup>1</sup> *Le Guen v. Gouverneur*, 1 Johns. Cas. 486, an authority of unusual value both by reason of its involving the first American discussion of the question, and from the great learning of the court rendering the opinion. *Bush v. Livingston*, 2 Caines' Cas. 66. See, also, *Beebe v. Bank*, 1 Johns. 529.

<sup>2</sup> *Newark &c. R. Co. v. Mayor &c.*, 28 N. J. Eq. 515, where the court

points out, discussing the English and New York cases, that the appellate court will dispose of the entire controversy. The case contained the precise questions which came before the court in *Richmond v. Atwood* (C. C. A.), 52 Fed. Rep. 10, where it was said, however, that the appellate court was not bound by any inflexible rule to make a full disposition of the cause. *s. c.*, p. 28. See, also, *Terhune v. Colton*, 12 N. J. Eq. 312.

<sup>3</sup> See the following section.

<sup>4</sup> *Blount v. Societe Anonyme Du Filtre &c.* (C. C. A.), 58 Fed. Rep. 96; *Columbus Watch Co. v. Robbins*, 52 Fed. Rep. 337. See, also, *Dudley E. Jones Co. v. Munger Mfg. Co.* (C. C. A.), 50 Fed. Rep. 785; *American Paper Pail Co. v. National Folding Box Co.* (C. C. A.), 51 Fed. Rep. 229, 232; *St. Paul &c. Ry. Co. v. Northern Pac. R. Co.* (C. C. A.), 49 Fed. Rep. 306, 308,

but that it may incidentally consider the questions relating to the validity and infringement of the patent as well as all other facts bearing upon the propriety of sustaining or dissolving the injunction awarded.<sup>1</sup> On the contrary, it has been ruled that the circuit court of appeals is clothed with all the powers of the court below, and may proceed to do what that court should have done, *e. g.*, dissolve the injunction, vacate an order for accounting and order the bill dismissed.<sup>2</sup> In view of the diversity of opinion the precise question has been certified to the Supreme Court.<sup>3</sup>

**§ 917. The same subject continued — Supersedeas.—**

Upon an appeal from an interlocutory order or decree granting or continuing an injunction, on a hearing in equity, under the provisions of section 7 of the Evarts Act, the granting of a stay of the operation of the injunction during the pendency of the appeal by the court which granted or continued it is not a matter of right, but is a matter of discretion,<sup>4</sup> and

300. In *Hart v. Buckner* (C. C. A.), 54 Fed. Rep. 925, it was held that the only question before the appellate court is the propriety of the injunction, and the right of the complainant to other relief demanded cannot be considered.

<sup>1</sup> *Blount v. Societe Anonyme Du Filtre* (C. C. App.), 53 Fed. Rep. 93.

<sup>2</sup> *Richmond v. Atwood*, 52 Fed. Rep. 10 (First Circuit, per Aldrich, D. J.). See *Dudley E. Jones Co. v. Munger Mfg. Co.*, 50 Fed. Rep. 785; *Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co.*, 53 Fed. Rep. 385. Aldrich, D. J., in the case first cited (at p. 24), said:—"It is quite probable, indeed quite clear, that a distinction would be made between injunctions granted preliminarily as a matter of discretion, and a decree for an injunction granted upon the final determination of a particular right; and the general rule that an appellate court interferes reluctantly with injunctions granted in

*limine* as a matter of discretion should not, in our view, apply to an appeal under the statute from an interlocutory decree for a perpetual injunction based upon a final determination of the substantial property right in a patent cause." In *Consolidated Piedmont Cable Co. v. Pacific Cable Co.* (C. C. A., Ninth Circuit), 58 Fed. Rep. 226, it was held by McKenna, C. J., that upon an appeal from an interlocutory order granting an injunction made on a hearing upon the merits of the whole case the circuit court of appeals has jurisdiction to review the merits.

<sup>3</sup> *Columbus Watch Co. v. Robbins*, 52 Fed. Rep. 837, 841, where the order certifying the question is given *in extenso*.

<sup>4</sup> *In re Haberman Mfg. Co.*, 147 U. S. 525 (per Blatchford, J.), disapproving the decision of Jackson, C. J., at circuit in *Societe Anonyme (Pasteur) v. Blount*, 51 Fed. Rep. 610, and affirming the decision of Cox, D. J.,

cannot be controlled by a writ of *mandamus* from the Supreme Court.<sup>1</sup>

**§ 918. Who may appeal — Appealable interest.**— A person not a party nor a privy to a judgment or decree cannot appeal therefrom.<sup>2</sup> If a party to the suit is in no manner affected by what is decreed he cannot be said to be a party to the decree.<sup>3</sup> Where the appellants were admitted parties to the suit solely for the purpose of appeal, their appeal brings the case up to the extent only that is necessary for the protection of their interests.<sup>4</sup> A reservation of the right to appeal does not confer the right to appeal from a decree in which the party is not legally interested.<sup>5</sup> "The right of appeal depends upon whether the appellant is, in a legal sense, aggrieved, and that must be determined by considering, not upon what grounds the chancellor has proceeded, but what effect his action has upon the claims of the appellant."<sup>6</sup> The

in *Lalanc &c. Mfg. Co. v. Habermann Mfg. Co.*, 54 Fed. Rep. 875.

<sup>1</sup> *In re Haberman Mfg. Co.*, 147 U. S. 525. See, also, on the general rule, *In re Hawkins*, 147 U. S. 487; *In re Morrison*, 147 U. S. 14; *Ex parte Morgan*, 114 U. S. 174; *Ex parte Burtis*, 108 U. S. 288; *Ex parte Schwab*, 98 U. S. 240.

<sup>2</sup> *Aiken v. Smith*, 54 Fed. Rep. 894; *Ex parte Cutting*, 94 U. S. 14; *Guion v. Insurance Co.*, 109 U. S. 173; *Elwell v. Fosdick*, 134 U. S. 518. One who is not a party to a suit and has not asked to be made a party or been treated as such cannot take an appeal from the decree. *Ex parte Cockroft*, 104 U. S. 578.

<sup>3</sup> *Farmers' Loan & Trust Co. v. Waterman*, 106 U. S. 265. A party cannot appeal from an order which does not touch the merits of the controversy nor affect his rights or interests. *Carr v. Hill*, 5 N. J. Eq. 689; *Stale v. White*, 2 Paige, 478. Parties to an action who have no legal interest either in maintaining or reversing the decree, such as mere deposi-

taries of the fund in dispute, are not necessary parties to an appeal therefrom. *Basket v. Hassell*, 107 U. S. 602. No person can appeal for the purpose of having a decree affirmed. *Green v. Blackwell*, 32 N. J. Eq. 768. <sup>4</sup> *Sage v. Central R. Co.*, 98 U. S. 412.

<sup>5</sup> *Farmers' Loan & Trust Co. v. Waterman*, 106 U. S. 265.

<sup>6</sup> *Mutual Life Ins. Co. v. Sturges*, 38 N. J. Eq. 328, 331. If a mortgagor who has sold his equity of redemption, and is therefore not a necessary party to a suit for foreclosure, be made a party nevertheless, and sets up the defense of usury, he has a right to appeal from a decree against him, because the decree would bar him from setting up the defense to a suit on the bond. *Andrews v. Stelle*, 23 N. J. Eq. 478. Where a sale is unfair and illegal, and the property, if fairly sold, would have brought enough to pay a lien creditor complainant, he is aggrieved by an order refusing to set aside the sale on his petition, and is a proper party to ap-

record must show that the party appealing has an interest in the matter sought to be presented by the appeal.<sup>1</sup> Where it appears from affidavits and other evidence filed on behalf of persons not parties to the suit that an appeal is not conducted by parties having adverse interests, but for the purpose of obtaining a decision of the court to affect the interests of persons not parties, the appeal will be dismissed.<sup>2</sup> A party cannot appeal from those parts of a decree which do not affect his interest.<sup>3</sup>

§ 919. **The same subject continued.**— A complainant who has parted with all his interest in the subject of the litigation *pendente lite* cannot appeal from a decree which injuriously affects such interest.<sup>4</sup> And it seems that, after a decree against the right of a party has been made, such party cannot dispose of his claim to another so as to give the latter a right to appeal from the decree.<sup>5</sup> Where the appellant, pending an appeal, surrendered the patent, which was the basis of the suit, and obtained a re-issue, the appeal was dismissed.<sup>6</sup>

§ 920. **Jurisdictional amount.**— Where a suit in equity is brought for the enforcement of a money demand, and the

peal. *National Bank v. Sprague*, 21 N. J. Eq. 458.

<sup>1</sup> *Fitzgerald v. Evans*, 49 N. J. Eq. 426; *Elliott on Appellate Procedure*, § 160.

<sup>2</sup> *Chamberlain v. Cleveland*, 1 Black, 419. See, also, *Dakota County v. Glidden*, 118 U. S. 232. Where there is no actual controversy there can be no effectual appeal. *Lord v. Veazie*, 8 How. 251; *Little v. Bowers*, 134 U. S. 547; *Elwell v. Fosdick*, 134 U. S. 500; *Board &c. v. Louisville &c. Co.*, 109 U. S. 231; *Elliott on Appellate Procedure*, § 148.

<sup>3</sup> *Card v. Bird*, 10 Paige, 426; *Cuyler v. Moreland*, 6 Paige, 273; *Hone v. Van Schaick*, 7 Paige, 221.

<sup>4</sup> *Card v. Bird*, 10 Paige, 426; *Steale v. White*, 2 Paige, 478.

<sup>5</sup> *Mills v. Hoag*, 7 Paige, 18, holding that if the purchaser is entitled

to appeal he must make himself a party to the suit by an original bill in the nature of a supplemental bill, and bring the appeal in his own name.

<sup>6</sup> *Meyer v. Pritchard*, 93 U. S. 375, on the authority of *Lord v. Veazie*, 8 How. 251, and *Cleveland v. Chamberlain*, 1 Black, 419. A decree was rendered against an executor, defendant, and the complainant appealed. The defendant was allowed an appeal, but before filing a bond he was removed from office and an administrator *de bonis non* appointed. The latter filed a petition in the Supreme Court praying leave to file a transcript, and that his bond be approved and *superseas* granted. The petition was dismissed on the ground that the course for him was to apply to the court below to be made a party and then

plaintiff appeals, the test of jurisdiction is the amount of his demand. But when the defendant is the appellant the "matter in controversy" is the sum decreed against him, and by the payment of which he may discharge himself; this amount is not to be augmented by that of disallowed claims set up in the answer.<sup>1</sup>

**§ 921. Appeals from joint decrees—Parties.**—All the parties against whom a joint judgment or decree is rendered must, except where they have separate and distinct interests, and the decree is several and does not jointly affect all, unite in the writ of error or appeal, or it will be dismissed unless there has been a summons and severance or some equivalent proceeding.<sup>2</sup> Where a party to a joint decree refuses to join in an appeal after written notice and due service, the court may on that ground grant an appeal to the other party as to his own interest.<sup>3</sup> One of several persons against whom a decree is

appeal in the ordinary way. *Taylor v. Savage*, 1 How. 282.

<sup>1</sup> *Kendrick v. Spotts* (Va.), 17 S. E. Rep. 853; *Lewis v. Long*, 8 Munf. 186; *Ambarger v. Watts*, 25 Gratt. 167; *Hawkins v. Gresham*, 85 Va. 84; *a. c.*, 6 S. E. Rep. 472; *Harman v. City of Lynchburgh*, 38 Gratt. 37. See further on the subject of jurisdictional amount, § 17 *et seq.*, *supra*.

<sup>2</sup> *Hardee v. Wilson*, 146 U. S. 179; *Hedges v. Seibert Cylinder Oil Cup Co.* (C. C. A.), 50 Fed. Rep. 648; *Owings v. Kincannon*, 7 Pet. 399; *Todd v. Daniel*, 16 Pet. 521; *Williams v. Bank*, 11 Wheat. 414; *Mussina v. Cavazos*, 6 Wall. 355; *Shamron v. Cavazos*, 20 How. 280; *Masterson v. Herndon*, 10 Wall. 416; *Feibelman v. Packard*, 108 U. S. 14; *Downing v. United States*, Appendix to 188 U. S. 98; *Mason v. United States*, 186 U. S. 581; *Estes v. Trabue*, 128 U. S. 325; *Aiken v. Smith*, 54 Fed. Rep. 894; *Phelps v. Ellsworth*, 8 Day, 397; *Humes v. Third Nat. Bank* (C. C. App.), 54 Fed. Rep. 917, where it was held that the sureties upon a *supersedeas* bond cannot have

the judgment thereafter entered against them in the trial court reviewed without joining the principal and all other defendants or obtaining a severance or other equivalent. If a judgment be against some of the defendants and in favor of the others, a writ of error must be brought in the names of the former only. *Coe v. Turner*, 5 Conn. 36.

<sup>3</sup> *Masterson v. Herndon*, 10 Wall. 416, holding, however, that an allegation in the petition for appeal of refusal to join is insufficient. *O'Dowd v. Russell*, 14 Wall. 402. Where a decree was joint against three complainants, only one of whom appealed, and there was nothing in the record showing that the other two had notice of the appeal or that they refused to join in it, the appeal was dismissed. *Downing v. McCartney*, 9 Wall. 463. Where an appellant obtains an order of severance in the court below, and does not make parties to his appeal some of the parties below who are interested in maintaining the decree, he cannot ask its reversal in the Su-

rendered may appeal and carry up the whole case for review, although the right of appeal may have been lost by the other parties.<sup>1</sup> Where a decree is severable in fact and in law, one defendant may be allowed to prosecute an appeal therefrom, without joining a co-defendant who does not desire to appeal.<sup>2</sup> An appeal by one of several defendants brings up so much of the case and such of the parties as are necessary for the determination of his rights.<sup>3</sup>

§ 922. Appeals by and against receivers.—A receiver in a foreclosure suit, although not a party, may appeal from a decree therein which settles his accounts.<sup>4</sup> A final decree rendered in favor of a receiver on an issue arising incidentally in a cause gives the adverse party a right of appeal against him.<sup>5</sup> An appeal by a receiver will not be dismissed because he did not first obtain leave of the court. The allowance of the appeal is equivalent to leave of the court to take it.<sup>6</sup> Under the Alabama code, giving an appeal as a matter of right only to the parties or their personal representatives, an appeal by a receiver from an order allowing claims on the funds in his hands in favor of one not a party to the original suit was dismissed.<sup>7</sup>

§ 923. Appeals by purchasers at foreclosure sales.—A party bidding at a foreclosure sale of a railroad makes himself

preme Court on any matter which will injuriously affect their interests. *Terry v. Merchants' & Planters' Bank*, 98 U. S. 38. A party defendant against whom a decree was taken *pro confesso* cannot make himself a party to a writ of error which was sued out by other defendants, so as to control the case in the appellate court. *Marsh v. Nichols & Co.*, 120 U. S. 598.

<sup>1</sup> *Peer v. Cookerow*, 14 N. J. Eq. 361.

<sup>2</sup> *City National Bank v. Hunter*, 129 U. S. 557; *Brewster v. Wakefield*, 22 How. 118. In *Gray v. Havemeyer* (C. C. App.), 58 Fed. Rep. 174, a decree in a foreclosure suit establish-

ing and declaring the validity of certain mechanics' liens in point of time was held to give a several right of appeal by the lienors.

<sup>3</sup> *Milner v. Meek*, 95 U. S. 252.

<sup>4</sup> *Hinckley v. Gilman & Co. R. Co.*, 94 U. S. 467.

<sup>5</sup> *Hovey v. McDonald*, 109 U. S. 150.

<sup>6</sup> *Farlow v. Kelly*, 108 U. S. 285.

<sup>7</sup> *Dorsey v. Sibert* (Ala.), 9 So. Rep. 288. Both the complainant and the defendant in a suit are necessary parties to an appeal by a receiver from an order requiring him to file a bond *nunc pro tunc*, the same having been first filed irregularly. *Whiteside v. Prendergast*, 2 Barb. Ch. 471.

thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree. When not concluded by the terms of the decree, any subsequent rulings which determine in what securities, of diverse value, his bid shall be made good, are matters affecting his interests, and in which he has a right to be heard in the trial court, and by appeal in the appellate court.<sup>1</sup> If the court errs in setting aside a judicial sale improperly, purchasers at the sale have the right to appeal.<sup>2</sup> An order for the surrender of a railroad by the receiver to purchasers at foreclosure sale provided that the latter should pay all claims adjudged to be of superior equity, with the right of appeal. Six months afterward an order was entered, as of the date of surrender, requiring the purchasers to pay certain claims. It was held that they were entitled to appeal.<sup>3</sup> Where the decree of sale on foreclosure of a railroad mortgage provides that the purchaser shall pay claims adjudged to be prior in equity to the mortgage debt, he is bound by the decision of the court as to such claims, and has no appealable interest therein.<sup>4</sup> A purchaser at a sale under order of court, bound to pay specific sums at given dates, is not interested in the manner in which the proceeds of the sale shall be distributed among the creditors entitled thereto.<sup>5</sup>

<sup>1</sup> *Kneeland v. American Loan Co.*, 186 U. S. 89, where the purchaser's appeal from adjudications in respect to intervening claims was entertained, the right of appeal being expressly reserved to him in the decree of foreclosure and sale; distinguishing *Swan v. Fabyan*, 110 U. S. 590. See, also, *Sage v. Central R. Co.*, 96 U. S. 712.

<sup>2</sup> *Blossom v. Milwaukee &c. R. Co.*, 1 Wall. 655.

<sup>3</sup> *Louisville &c. R. Co. v. Wilson*, 188 U. S. 501.

<sup>4</sup> *Trust Co. v. Grant Locomotive*

*Works*, 185 U. S. 207. See, also, *Swan v. Wright's Ex'r*, 110 U. S. 590, 601.

<sup>5</sup> *Stuart v. Gay*, 127 U. S. 530. Where a purchaser of a railroad upon a mortgage foreclosure sale, by the express terms of the decree of sale, was required without qualification to take the property, upon confirmation of the sale, subject to the liens already established, or which might on pending references be established, as prior to the mortgage, he cannot maintain an appeal to have the decree opened for the purpose of relitigating those liens. *Swan v. Fabyan*, 110 U. S. 590.

§ 924. Appeals by intervenors and petitioners to intervene.— Parties only, or those who represent them, can appeal. Stockholders whose petition for intervention was denied cannot appeal from the decree.<sup>1</sup> A State cannot appeal from an order dismissing its petition to be made a party to proceedings, which does not conclude any of its rights with respect to parties in the suit.<sup>2</sup> A receiver appointed by another court, alleging an interest as such in the property in litigation, was admitted as a defendant in a suit and filed a cross-bill, which was stricken from the files with leave to apply for leave to file another. He never made any application, but suffered the case to proceed to a final decree between the original parties expressed to be without prejudice to his rights as receiver. It was held that he was not aggrieved and could not appeal.<sup>3</sup> Where a municipal corporation was allowed to intervene and set up a claim for taxes on property involved in foreclosure proceedings, it may appeal from an order rejecting its claim on the merits.<sup>4</sup> After a decree of foreclosure was taken as confessed, the petitioners were permitted to intervene as defendants. The case was then referred to a master, and upon his report a final decree of sale was entered. It was held that petitioners had a right to appeal from this decree.<sup>5</sup>

§ 925. The same subject continued.— Persons who are incidentally interested in some branch of a case, and who have been allowed to intervene for the purpose of protecting their interests, are *quasi*-parties, and may appeal from a final decision upon their right or claim.<sup>6</sup> Where on a creditor's bill the

<sup>1</sup> *Ex parte* Cutting, 94 U. S. 14; *Guion v. Liverpool &c. Ins. Co.*, 109 U. S. 168, to the same effect.

<sup>2</sup> *Georgia v. Jesup*, 106 U. S. 458.

<sup>3</sup> *Close v. Glenwood Cemetery*, 107 U. S. 466.

<sup>4</sup> *Savannah v. Jesup*, 106 U. S. 568.

<sup>5</sup> *Ex parte* Jordan, 94 U. S. 248. See, also, § 579, *supra*. In a suit to foreclose a railroad mortgage, the holder of the first-mortgage bonds and trustee of the second mortgage and another interested in the purchasing agreement may intervene

and contest the allowance to the trustee of the first mortgage for his compensation, and appeal from the decree making his allowance. *Williams v. Morgan*, 111 U. S. 684.

<sup>6</sup> *Williams v. Morgan*, 111 U. S. 684, where a holder of railroad bonds secured by a mortgage under foreclosure, having intervened and contested the amount of the trustee's compensation, was allowed to appeal from an adverse decision; *Blossom v. Milwaukee Railroad*, 1 Wall. 655, where a purchaser at a foreclosure sale was



cause is referred to a master to take proofs of all claims against the estate of the defendant which may be presented to the receiver, and a claim is sought to be proved before the master by a creditor who is not a party to the bill, and the master reports to the court that he has disallowed the claim, and upon exceptions taken to the report the court overrules the exceptions and sustains the report, an appeal will lie on behalf of such claimant.<sup>1</sup>

**§ 926. Appeal by party accepting benefit of decree.**—A party cannot accept the benefit of a decree and at the same time appeal from it; and an election to take one of these courses is a renunciation of the other.<sup>2</sup> But it has been repeatedly held that if the pleadings admit a certain amount due, and such sum is voluntarily tendered after a decree for a larger amount, the prevailing party may accept the tender without waiving the right to appeal.<sup>3</sup> Where, however, even a part of the payment is not voluntary, but coerced by the decree, its acceptance constitutes a waiver of the right of appeal,<sup>4</sup> unless the decree is severable.<sup>5</sup>

admitted to appeal. *Minnesota Co. v. St. Paul Co.*, 3 Wall. 609, 684, to the same effect. *Hinckley v. Gilman & Co. R. Co.*, 94 U. S. 467, where a receiver was allowed to appeal from a decree against him to pay a sum of money in the cause in which he was appointed receiver; *Sage v. Railroad Company*, 96 U. S. 712, where parties interested were allowed to appeal from an order confirming a sale; *Trustees v. Greenough*, 105 U. S. 527, where an appeal from an order for allowance of costs and expenses to a complainant suing in behalf of a trust fund was sustained; *Hovey v. McDonald*, 109 U. S. 150, where an appeal was allowed to be brought against a receiver from an order made in his favor.

<sup>1</sup> *Derrick v. Insurance Co.*, 74 Ill. 404.

<sup>2</sup> *Moore v. Floyd*, 4 Oregon, 260; *Elliott on Appellate Procedure*, § 150.

<sup>3</sup> *Embry v. Palmer*, 107 U. S. 8; s. c., 8 S. Ct. Rep. 25; *Morris v. Garland*, 78 Va. 215; *Higbie v. Westlake*, 14 N. Y. 288; *Dudman v. Earle*, 49 Iowa, 87; *Manufacturing Co. v. Huiske*, 69 Iowa, 557; *Portland Const. Co. v. O'Neil* (Oregon), 32 Pac. Rep. 764. The acceptance by appellants of what was confessedly theirs cannot be construed into an admission that the decree they seek to reverse is erroneous, nor does it take from appellees anything on the reversal of the decree to which they would otherwise be entitled. *Reynes v. Dumont*, 180 U. S. 854. The making of a conveyance of real estate, as ordered by a decree, does not deprive the party of the right of appeal. *O'Hara v. McConnell*, 98 U. S. 150.

<sup>4</sup> Thus in an action to foreclose a lien, where the decree finds that there is due a certain sum in addition to the amount admitted by de-

<sup>5</sup> *Inverarity v. Stowell*, 10 Oregon, 361, a case of a severable decree.

§ 927. **Appeal by defendant after default at the hearing.**— If a defendant does not appear at the hearing before the chancellor, the cause having been regularly noticed for argument, he cannot appeal from the decree thus rendered in his absence. This is according to the well-settled rule of the House of Lords in England,<sup>1</sup> of the court of appeals of New York,<sup>2</sup> and of the court of errors and appeals of New Jersey.<sup>3</sup> If the absence was involuntary or accidental and a defense was intended to be made, the remedy is by petition to the chancellor for a rehearing, which in practice is freely granted.<sup>4</sup>

§ 928. **Appeals from consent decrees.**— Courts of chancery generally hold that decrees by consent are not subject to rehearing or appeal.<sup>5</sup> Although that rule has not prevailed in the United States Supreme Court,<sup>6</sup> yet if all the errors complained of in the consent decree come within the waiver implied by consent, the decree below will be affirmed without considering the merits of the cause,<sup>7</sup> but only after hearing;<sup>8</sup> the only question being whether under any state of facts the decree could be entered.<sup>9</sup> Where it appears of record that a

defendants to be due, and which they have deposited with the clerk of the court, and directs a sale of the property unless such amount is paid, and defendants deposit such additional amount with the clerk, and plaintiff accepts the whole amount so deposited, he cannot afterwards return the same to the clerk, and appeal from the decree, on the ground that there was more due him, since his acceptance of the money satisfies the decree. *Portland Const. Co. v. O'Neil* (Oregon), 82 Pac. Rep. 764.

<sup>1</sup> *Dean v. Abel*, 1 Dick. 287; *Stubbs v. Dunsany*, 10 Ves. 30; *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 712.

<sup>2</sup> *Sands v. Hildreth*, 12 Johns. 498; *Franklin v. Osgood*, 14 Johns. 527; *Kane v. Whittick*, 8 Wend. 219; *Murphy v. American L. Ins. & T. Co.*, 25 Wend. 249.

<sup>3</sup> *Townsend v. Smith*, 12 N. J. Eq. 350.

<sup>4</sup> *Townsend v. Smith*, 12 N. J. Eq. 350; *Vowles v. Young*, 9 Ves. 172; *Cunningham v. Cunningham*, 1 Ambler, 69.

<sup>5</sup> *Winchester v. Winchester*, 121 Mass. 127; *Nashville & Co. Ry. Co. v. United States*, 118 U. S. 261. See §§ 792, 795, 844, 853, *supra*, on consent decrees and rehearing of consent decrees. The rule applies though both parties consent that either may appeal. *Jarvis v. Palmer*, 1 Barb. Ch. 379.

<sup>6</sup> *Nashville & Co. Ry. Co. v. United States*, 118 U. S. 261; *Pacific R. Co. v. Ketchum*, 101 U. S. 289.

<sup>7</sup> *Nashville & Co. Ry. Co. v. United States*, 118 U. S. 261; *Pacific R. Co. v. Ketchum*, 101 U. S. 289; *United States v. Babbitt*, 104 U. S. 767.

<sup>8</sup> *Pacific R. Co. v. Ketchum*, 101 U. S. 289.

<sup>9</sup> *Pacific R. Co. v. Ketchum*, 101 U. S. 289. See, also, *Mandeville v. Holey*, 1 Pet. 136.

defendant assented to a decree through its solicitor, it is equivalent to a direct finding as a fact by the court that the solicitor had authority to do what he did, and it is binding on appeal so far as the question is one of fact only.<sup>1</sup>

**§ 929. Appeals from orders granting or refusing an issue.** Although the granting or refusing of an issue to the jury is a matter resting in discretion,<sup>2</sup> an appeal lies from the exercise of such discretion;<sup>3</sup> but the appellate court will not interfere except in a case of palpable abuse.<sup>4</sup> It will not interfere with the discretion of the chancellor as to the form of the issue, if the form be appropriate to secure a fair presentation of the issue at the trial.<sup>5</sup> A party who has not asked for an issue cannot sustain an appeal on the ground that such issue would have been proper.<sup>6</sup>

**§ 930. Appeal upon question of costs.**—As a general rule an appeal does not lie from a decree upon the mere question of costs.<sup>7</sup> But where a party is entitled to costs as a matter

<sup>1</sup> *Pacific R. Co. v. Ketchum*, 101 U. S. 289.

<sup>2</sup> See § 659, *supra*.

<sup>3</sup> § 659, *supra*; *Townsend v. Graves*, 8 Paige, 457; *Gardner v. Gardner*, 22 Wend. 526; *Belknap v. Trimble*, 3 Paige, 601; *Drayton v. Logan*, Harp. Eq. 57; *Williams v. Guest*, L. R. 10 Ch. App. 467; *Nicol v. Vaughan*, 8 Dow. & C. 420; *American Dock Co. v. Trustees &c.*, 87 N. J. Eq. 267; *New Jersey &c. R. Co. v. Mayor &c.*, 28 N. J. Eq. 515. *Contra* in Pennsylvania. *Scheetz's Appeal*, 85 Pa. St. 88. In Massachusetts:—"It is well settled that an appeal to the full court lies from the order of a single justice refusing to frame issues to a jury in an equity case upon the application of one of the parties." *Merchants' Nat. Bank v. Moulton*, 148 Mass. 543, 544; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Harris v. Mackintosh*, 123 Mass. 228; *Brooks v. Tarbell*, 103 Mass. 496. See §§ 655,

659, n. 4, *supra*. Mass. Gen. St., ch. 118, § 10, was enacted subsequently to the decisions in *Ward v. Hill*, 4 Gray, 593; *Crittenden v. Field*, 8 Gray, 626.

<sup>4</sup> § 659, *supra*.

<sup>5</sup> *American Dock Co. v. Trustees &c.*, 87 N. J. Eq. 267. On an appeal from an order of the chancellor, made at the final hearing, for an issue to be tried by a jury, the court in its discretion will decide the entire controversy or send the case back with instructions. *Newark &c. R. Co. v. Mayor &c. of Newark*, 28 N. J. Eq. 515.

<sup>6</sup> *Townsend v. Graves*, 8 Paige, 453; *Belknap v. Trimble*, 8 Paige, 577.

<sup>7</sup> *Russell v. Farley*, 105 U. S. 433; *Canter v. Insurance Co.*, 8 Pet. 307; *Elastic Fabric Co. v. Smith*, 100 U. S. 112; *Burns v. Rosenstein*, 185 U. S. 450, 456, where the court below allowed the plaintiff a proportionate part of the expense for preservation and keeping of property attached.

of strict right,<sup>1</sup> or where costs are disposed of as matter of relief,<sup>2</sup> or are given or refused contrary to an express statute,<sup>3</sup> an appeal may be sustained as to such costs. So an appeal lies when the costs are directed to be paid, not by a particular party, but out of a fund in the hands or under the control of the court,<sup>4</sup> and when the costs are charged<sup>5</sup> or chargeable<sup>6</sup> against an estate.

§ 931. *The same subject continued.*—The general rule stated in the preceding section is so strictly adhered to that the court will not permit it to be evaded by coupling the appeal for costs with another ground of appeal which is unfounded for the mere purpose of giving color to the appeal for costs.<sup>7</sup> But “if a party appeals, having a substantial ground of appeal and a fair question to agitate, and brings in the question of costs along with it, he may succeed with respect to the

Glendale &c. Co. v. Smith, 100 U. S. 110; Paper Bag Machine Cases, 105 U. S. 766; Washington Market Co. v. District of Columbia, 137 U. S. 62; Baltimore Tel. Co. v. Interstate Tel. Co. (C. C. App.), 54 Fed. Rep. 50, 55; Lovejoy v. Chapman (Oregon), 32 Pac. Rep. 687; Winslow v. Collins, 3 Paige, 88; Lain v. Lain, 10 Paige, 191; Eastburn v. Kirk, 2 Johns. Ch. 317; Norton v. Ladd, 23 Conn. 204; Cowles v. Whitman, 10 Conn. 121; Utica Cotton Mfg. Co. v. Supervisors &c., 1 Barb. Ch. 432; Tomlinson v. Ward, 2 Conn. 396; Lozeau v. Shields, 23 N. J. Eq. 509; Cronkright v. Haulenbeck, 35 N. J. Eq. 279; Rogers v. Holly, 18 Wend. 350; Ashby v. Kiger, 3 Rand. 165; M'Millan v. Eldridge, Harp. Eq. 260; Lewis v. Wilson, 1 McCord Ch. 210; Lyles v. Lyles, 1 Hill Ch. 76, 92; Hope v. Carnegie, L. R. 4 Ch. App. 264; Owen v. Griffith, 1 Ves. Sr. 250.

<sup>1</sup> Buloid v. Miller, 4 Paige, 473; Winslow v. Collins, 3 Paige, 88.

<sup>2</sup> Taylor v. Popham, 15 Ves. 72; Burkett v. Spray, 1 R. & M. 113, 115; Taylor v. Southgate, 4 Myl. & C. 208;

Eyre v. Marsden, 4 Myl. & C. 231; Angell v. Davis, 4 Myl. & C. 360; Winslow v. Collins, 3 Paige, 88. See, also, Perks v. Stothert, 11 W. R. 1016; Chappell v. Gregory, 2 De G., J. & S. 111; Witt v. Corcoran, 2 Ch. Div. 69; Hope v. Carnegie, L. R. 4 Ch. App. 264, 265; Chappell v. Purday, 2 Phil. 227, 229; Horn v. Coleman, 5 W. R. 409; *Re Cant's Estate*, 1 De G., F. & J. 153.

<sup>3</sup> Winslow v. Collins, 3 Paige, 88;

Buloid v. Miller, 4 Paige, 473; Dudley v. Facer (Utah), 32 Pac. Rep. 668, an appeal on the sole question of costs, holding also that a territorial legislature has power to regulate costs in equity in the district courts of the territory. *Tod v. Tod*, 1 Bligh (N. S.), 639.

<sup>4</sup> Trustees v. Greenough, 105 U. S. 527; 2 Daniell's Ch. Pr. (5th ed.) 1463.

<sup>5</sup> Jenour v. Jenour, 10 Ves. 562, 573. See, also, Cowper v. Scott, 1 Eden, 17.

<sup>6</sup> Owen v. Griffith, 1 Ves. Sr. 250.

<sup>7</sup> 2 Daniell's Ch. Pr. (5th ed.) 1466; Attorney-General v. Butcher, 4 Russ. 180.

costs, though he does not succeed in the substantial ground of appeal.”<sup>1</sup>

§ 932. Appeals in matters of discretion.—An appeal will not lie from a decree which is merely the result of the exercise of discretion in a case where the matter was fairly a subject for the exercise of discretion.<sup>2</sup> In New Jersey it was said that “the mere fact that a matter lies in discretion does not necessarily exclude an appeal. Where . . . the discretion of the chancellor is controlled and governed by a fixed and determined rule, the failure to apply which would substantially affect the legal and equitable rights of the complainant, an appeal would lie.”<sup>3</sup> So in the United States Supreme Court it was said that “orders made by the circuit court are not exempt from appeal merely because they are the exercise of a discretionary power. Whether the authority has been applied and governed by the principles of a judicial discretion or exercised in a manner that cannot be reviewed in this court is itself a proper matter of review.”<sup>4</sup>

§ 933. The same subject continued — Illustrations.—No appeal lies from a mere initiatory order;<sup>5</sup> nor from an order

<sup>1</sup> Per Lord Lyndhurst in *Attorney-General v. Butcher*, 4 Russ. 180; *Winslow v. Collins*, 3 Paige, 88, 89; 2 *Daniell's Ch. Pr.* (5th ed.) 1466; *Jenour v. Jenour*, 10 Ves. 562, 578; *Pitt v. Page*, 1 Bro. P. C. (ed. Toml.) 1; *Squire v. Pershall*, 2 Bro. P. C. (ed. Toml.) 396; *Weckett v. Raby*, 2 Bro. P. C. (ed. Toml.) 386; *Lewis v. Smith*, 1 Macn. & G. 417, 421; *Reynell v. Sprye*, 1 De G., M. & G. 660, 688; *Power v. Reeves*, 10 H. L. Cas. 645. See, also, *Randolph v. Rosser*, 7 Porter (Ala.), 249; *Hunt v. Lewin*, 4 Stew. & Port. 188; *McCrary v. Jones* (S. C.), 15 S. E. Rep. 490, 451. The appellate court will not give advice as to the costs in equity where the equities of the case are not fully developed before them and can be better understood by the court below. *Hoyt v. Smith*, 28 Conn. 467.

<sup>2</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1462.

1463. Appeals ought to be discouraged from the exercise of the discretion of a judge where he has gone upon a right principle. *Fisher v. Owen*, L. R. 8 Ch. Div. 645, 653; *Leicester Piano Co. v. Front Royal & Imp. Co.*, 55 Fed. Rep. 190, 197; *Camden & C. R. Co. v. Stewart*, 21 N. J. Eq. 484; *In re Anderson*, 17 N. J. Eq. 556; *National Bank v. Sprague*, 21 N. J. Eq. 458; *Rowley v. Van Benthuyssen*, 16 Wend. 369, 371, 378; *Tripp v. Cook*, 26 Wend. 150, 155; *Robertson v. Bingley*, 1 McCord Ch. 351; *Owings v. Worthington*, 10 Gill & J. 288; *Scott v. Crawford*, 10 Gill & J. 379; *Merriam v. Barton*, 14 Vt. 501; *Privett v. Calloway*, 75 N. C. 283.

<sup>3</sup> *Vanderveer's Adm'r v. Holcomb*, 23 N. J. Eq. 553, 559.

<sup>4</sup> *Ex parte Farmers' L. & C. Co.*, 129 U. S. 215.

<sup>5</sup> *McCredie v. Senior*, 4 Paige, 378;

refusing a new trial;<sup>1</sup> nor from an order refusing petitioners leave to intervene and become parties to a suit;<sup>2</sup> nor from an order directing the sale of the property in litigation and that the money be brought into court;<sup>3</sup> nor from the refusal of the court below to open a former decree;<sup>4</sup> nor from a refusal to open a cause after a trial is closed to receive the testimony of an additional witness;<sup>5</sup> nor from the refusal of a motion for the delivery of securities on file to one of the parties;<sup>6</sup> nor from a refusal to allow amendments to a bill<sup>7</sup> or petition,<sup>8</sup> or to permit the latter to be filed as a bill of review as of the date of the previous filing;<sup>9</sup> nor from the refusal to permit a defendant to retract an admission in a sworn answer;<sup>10</sup> nor from a refusal to remove an executor and appoint a receiver;<sup>11</sup> nor from the allowance of further time for filing pleadings or permitting a pleading filed out of time to stand;<sup>12</sup> nor from

Buel v. Street, 9 Johns. 443; Trustees &c. v. Nicoll, 8 Johns. 566.

<sup>1</sup> Cambuston v. United States, 95 U. S. 285.

<sup>2</sup> *Ex parte* Cutting, 94 U. S. 14; Bronson v. La Crosse R. Co., 2 Wall. 802. See § 580, *supra*.

<sup>3</sup> Chapman v. Hammersley, 4 Wend. 173; McKim v. Thompson, 1 Bland, 172.

<sup>4</sup> Brockett v. Brockett, 2 How. 238; McMicken v. Perin, 18 How. 507; Rowley v. Van Benthuyzen, 16 Wend. 332; Powell v. Clement, 78 Ill. 20; Bank of Statesville v. Foote, 77 N. C. 181; Peoria Ry. Co. v. Mitchell, 74 Ill. 394. An order denying an application to open a decree, and for leave to answer and present the merits of the defense, on the ground that the solicitor who appeared for the defendant was not authorized to appear for him, and that the case was heard upon a stipulation admitting the allegations of the bill, given by such solicitor without the defendant's knowledge or consent, is an appealable order. Read v. Patterson, 44 N. J. Eq. 211. See, also, Saleski v. Boyd, 32 Ark. 74; §§ 795, 844, *supra*.

<sup>5</sup> Gainty v. Russell, 40 Conn. 450. See § 547 *et seq.*, *supra*. *Cf.* Beach v. Fulton Bank, 2 Wend. 225. The decision of the court below, as to enlarging the time to take testimony, will not be reviewed except in flagrant cases. Ingle v. Jones, 9 Wall. 486.

<sup>6</sup> Driggs v. Daniels, 2 MacArth. 254.

<sup>7</sup> Mercantile Nat. Bank v. Carpenter, 101 U. S. 567, unless it appear affirmatively that the court abused its discretion.

<sup>8</sup> Trust Co. v. Grant Locomotive Works, 185 U. S. 208.

<sup>9</sup> Trust Co. v. Grant Locomotive Works, 185 U. S. 208. The refusal of the court to permit a supplemental bill to be filed was held to be a matter of discretion and no ground for reversing the decree. Dean v. Mason, 20 How. 198.

<sup>10</sup> Jones v. Morehead, 1 Wall. 155.

<sup>11</sup> Rogers v. Hosack's Ex'rs, 18 Wend. 380.

<sup>12</sup> Read v. Huff, 40 N. J. Eq. 229, 232, an order refusing to dismiss a bill on the ground that the replication was not filed within the time prescribed by law. See § 479, *supra*. The granting or refusing of leave to

an order staying proceedings under the original bill until a cross-bill has been answered,<sup>1</sup>—and the fact that the order is in the form of an injunction, and that such writ is prayed for in the cross-bill, 'does not affect the rule;<sup>2</sup> nor from a decree ordering an account.<sup>3</sup> An order refusing to set aside a sale, upon an application based on the illegality of the sale, is appealable; it is not a discretionary order.<sup>4</sup>

§ 934. **Matters of discretion further illustrated.**—The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case has been heard or tried and is not a subject of appeal.<sup>5</sup> In the federal courts the removal or appointment of a receiver is not reviewable on appeal;<sup>6</sup> but in some of the States where appeals are allowed from interlocutory orders a different rule prevails.<sup>7</sup>

§ 935. **Cross-appeals.**—If appellees desire to avail themselves of error in the decree they should bring a cross-appeal;

file an amended bill or plea is a matter within the discretion of the trial court and will not be reviewed in an appellate court unless there has been a gross abuse of this discretion. *Chapman v. Barney*, 139 U. S. 677; *Gormley v. Bunyan*, 188 U. S. 681; *Hicklin v. Marco (C. C. A.)*, 56 Fed. Rep. 549, 552. Where an answer is filed by leave of court after the expiration of time to answer, and the court refuses to hold the defendant to an equitable defense, such refusal is appealable in New Jersey. But the appeal should be taken from a refusal of a motion to strike out the defense, and not from the order granting leave to answer without restriction. *Vanderveer's Adm'r v. Holcomb*, 22 N. J. Eq. 555, 559, quoted in § 932, *supra*. See § 868, *supra*.

<sup>1</sup> *Stevens' Ex'r v. Stevens' Ex'rs*, 24 N. J. Eq. 574.

<sup>2</sup> *Stevens' Ex'r v. Stevens' Ex'rs*, 24 N. J. Eq. 574.

<sup>3</sup> *Berryhill v. McKee*, 8 Yerg. 157.

<sup>4</sup> "This result, of course, would not follow in an application not based upon the illegality of the sale, but upon matters on which it is in the discretion of the court to give relief or not." *National Bank v. Sprague*, 21 N. J. Eq. 458, citing English and American cases.

<sup>5</sup> *Roemer v. Neumann*, 132 U. S. 108; *Boesch v. Graff*, 138 U. S. 697; *Barnes v. Grove (Mich.)*, 56 N. W. Rep. 599; *Read v. Patterson*, 44 N. J. Eq. 211, 218; *Steines v. Franklin County*, 14 Wall. 15; *Galloway v. Dunnington*, 10 Lea, 216, 218. See, also, *Kilbourn v. Sunderland*, 180 U. S. 505; § 868, *supra*; *Kelley v. McKinney*, 5 Lea, 164, 169.

<sup>6</sup> *Milwaukee &c. R. Co. v. Soutter*, 1 Wall. 279; *Milwaukee &c. R. Co. v. Howard*, 3 Wall. 356.

<sup>7</sup> *Dale v. Kent*, 58 Ind. 584. See, § 720, *supra*; *Shannon v. Hanks*, 68 Va. 388; s. c., 18 S. E. Rep. 487; *Smith v. Butcher*, 28 Gratt. 144.

by omitting to do so they admit the correctness of the decree as to them.<sup>1</sup> Where the appellant does not succeed in reversing any part of the decree and the respondent has not brought a cross-appeal, the appellate court cannot reverse or modify the decree in a part which is erroneous as to such respondent.<sup>2</sup>

**§ 936. Limitation of time for appeals — In the federal courts.**— Appeals or writs of error from judgments or decrees of the United States circuit or district court or a State court to the United States Supreme Court must be taken within two years after the entry of such judgment, decree or order, except in cases of disability arising from infancy, insanity or imprisonment.<sup>3</sup> An appeal taken from a decree more than two years after its entry, though less than two years from the date when it took full effect, was dismissed.<sup>4</sup> The day on which the decree is entered is excluded from the computation.<sup>5</sup> “The rule is that if a motion or petition for a rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed

<sup>1</sup> *Chittenden v. Brewster*, 2 Wall. 191; *Winslow v. Wilcox*, 105 U. S. 447; *Mackall v. Mackall*, 185 U. S. 167, 170; *Goodwin v. Fox*, 129 U. S. 401; *Green v. Blackwell*, 83 N. J. Eq. 768, 771. The Supreme Court cannot consider an objection raised by the appellee to the decree appealed from. *Gage v. Pumpelly*, 115 U. S. 454. Where the plaintiff alone appeals from a decree in his favor, it is not open to the defendant to contend that the plaintiff was not entitled to any decree. *May v. Gates*, 187 Mass. 389. If a cross-appeal is not perfected the court will not notice errors assigned in the brief of counsel for appellee on the appeal. *Clark v. Killian*, 108 U. S. 766. See, also, *Farrar v. Churchill*, 185 U. S. 612.

<sup>2</sup> *Mapes v. Coffin*, 5 Paige, 296; *Townsend v. Graves*, 8 Paige, 458.

<sup>3</sup> U. S. R. S., § 1008. Cross-appeals must be prosecuted within the time

limited. *Farrar v. Churchill*, 185 U. S. 612. A party is not within the benefit of the proviso unless the disability existed at the date of the decree. Imprisonment subsequent to the decree does not suspend the operation of the statute. *McDonald v. Hovey*, 110 U. S. 619.

<sup>4</sup> *Radford v. Folsom*, 181 U. S. 392. See, also, *Rubber Co. v. Goodyear*, 6 Wall. 153; *De Valle v. Harrison*, 98 U. S. 233; *Polleys v. Black River Imp. Co.*, 118 U. S. 81. Where a decree of absolute foreclosure by the United States circuit court is erroneous because of the omission to allow a time for redemption provided by the statute of the State, the appeal may be taken within two years, though it be after the statutory time for redemption has expired. *Mason v. Northwestern Mut. L. Ins. Co.*, 106 U. S. 168.

<sup>5</sup> *Smith v. Gale*, 187 U. S. 577.



of.”<sup>1</sup> In such cases the appellate court will presume that the petition for rehearing was filed in time.<sup>2</sup> By the Evarts Act appeals must be taken from the circuit court of appeals to the United States Supreme Court within one year after the entry of the decree sought to be reviewed.<sup>3</sup> The same act limits the time for appeals to the circuit court of appeals to the period of six months after the entry of the order, judgment or decree sought to be reviewed; “provided, however, that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit court of appeals.”<sup>4</sup> Another proviso limits appeals to the circuit court of appeals from interlocutory orders or decrees granting or continuing injunctions to the period of thirty days from the entry of such order or decree.<sup>5</sup> An appeal is not “taken or sued out” until the allowance by a judge of the trial court.<sup>6</sup> When the last day of the period prescribed by law falls on Sunday, an appeal cannot be taken or writ of error sued out on any subsequent day.<sup>7</sup>

§ 937. Power to extend time for appeals.—Where the time for appealing is regulated by rule of court, the chancellor, on sufficient cause being shown, may dispense with the rule and enlarge the time.<sup>8</sup> Where the time allowed for appealing is fixed by statute, the court cannot extend the time for appealing indirectly, by vacating the decree or order and entering it.

<sup>1</sup> *Aspen Min. & Sm. Co. v. Billings* (U. S.), 14 S. Ct. Rep. 4, citing *Brockett v. Brockett*, 2 How. 288, 240; *Railroad Co. v. Murphy*, 111 U. S. 488; *Memphis v. Brown*, 94 U. S. 715.

<sup>2</sup> *Aspen Min. & Sm. Co. v. Billings* (U. S.), 14 S. Ct. Rep. 4; *Texas & C. Ry. Co. v. Murphy*, 111 U. S. 488.

<sup>3</sup> 26 St. at L., ch. 517, § 6, p. 828.

<sup>4</sup> 26 U. S. St. at L., ch. 517, § 11, p. 829. Where a writ of error was allowed by the judge, but was not actually issued by the court within the time for suing it out, the writ was dismissed. *United States v. Baxter*, 2 C. C. A. 410; *Brooks v. Norris*,

11 How. 207. An appeal not taken within the time limited must be dismissed. *Hamilton v. Brown*, 53 Fed. Rep. 753; *Coulliette v. Thomason*, 50 Fed. Rep. 787.

<sup>5</sup> 26 U. S. St. at L., ch. 517, § 7, p. 828.

<sup>6</sup> *Warner v. Texas & C. Ry. Co.* (C. C. A.), 54 Fed. Rep. 920; *Barrel v. Transportation Co.*, 8 Wall. 424; *Brooks v. Norris*, 11 How. 204; *Scarborough v. Pargoud*, 106 U. S. 567.

<sup>7</sup> *Johnson v. Meyers* (C. C. A.), 54 Fed. Rep. 417.

<sup>8</sup> *Smith v. Smith*, 1 Paige, 391; *Caldwell v. Mayor & Co.*, 9 Paige, 572.

as of a more recent date, for the mere purpose of giving a party the right to appeal after the time limited by law has expired.<sup>1</sup>

§ 938. **Appealable interlocutory decrees**—In New Jersey.—The English books of practice state the rule that any person who finds himself aggrieved by a decree or order of the court of chancery is entitled as a matter of right to appeal to the House of Lords.<sup>2</sup> In New Jersey “all persons aggrieved by any order or decree of the court of chancery may appeal from the same or any part thereof to the court of errors and appeals.”<sup>3</sup> As to what constitutes an appealable order under the statute it is not possible to adopt any universal criterion. In *Camden &c. R. Co. v. Stewart*,<sup>4</sup> Chief Justice Beasley declared that “It is not practicable to settle any test which will be applicable in every case, so as to separate into classes those orders which are appealable and those which are not. There are many cases which are obviously appealable; there are some as obviously not appealable; but there is an intermediate class which cannot be reduced to any fixed rule. When this latter class is to be dealt with, it would seem that the court is called upon to exercise a special judgment in each case, in view of its peculiar circumstances, and having regard to the general proposition above noticed, that an order to be appealable must go to some extent to the merits of the controversy or substantially affect the legal or equitable rights of the party appealing.”<sup>5</sup>

<sup>1</sup> *Credit Co. v. Arkansas Cent. R. Co.*, 128 U. S. 254; *Bank of Monroe v. Widner*, 11 Paige, 529; *Caldwell v. Mayor &c.*, 9 Paige, 572; *Townsend v. Townsend*, 2 Paige, 418. See *Barclay v. Brown*, 7 Paige, 245, applying the contrary rule where the party was misled by the mistake or neglect of the clerk. An order extending the time for filing the record on appeal made after the time has expired is ineffective. *West v. Irwin*, 54 Fed. Rep. 419. The time for claiming an appeal cannot be extended by con-

sent of parties or by the justice whose decree is appealed from. *Attorney-General v. Barbour*, 121 Mass. 568.

<sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 1491; *Camden &c. R. Co. v. Stewart*, 21 N. J. Eq. 484 *et seq.*

<sup>3</sup> R. S. p. 125, § 114; *Nixon's Dig.* 116, pl. 80.

<sup>4</sup> 21 N. J. Eq. 489.

<sup>5</sup> *Camden &c. R. Co. v. Stewart*, 21 N. J. Eq. 484, 487. See, also, *Conger v. Douglass*, 8 Barb. Ch. 81, and cases there cited.

§ 939. **The same subject continued.**—An appeal lies from an order sustaining exceptions to a bill for impertinence.<sup>1</sup> The general rule is that an appeal will lie from all orders either granting, refusing, sustaining or dissolving injunctions.<sup>2</sup> An order for the sale of bonds, or granting leave to a receiver of an insolvent corporation to sell or dispose of bonds, the property of a third person, pledged for the receiver's security and protection against debts and liabilities of the corporation of which he was receiver, made on rule to show cause and the hearing of parties interested, is an appealable order.<sup>3</sup> An order founded upon a denial of the equitable right of the complainant to prosecute his suit, imposing a condition upon him, and arresting his proceeding for an indefinite time, is appealable.<sup>4</sup> An appeal lies from an order directing a suit to stand revived against the representatives of the deceased party, if the rights of the appellant are in any way affected by such revival.<sup>5</sup>

§ 940. **What constitute final appealable decrees—Generally.**—A final decree is not necessarily the last order in the case, as orders sometimes follow merely for the purpose of carrying out or executing the matters which the decree has determined, but when it finally fixes the right of the parties it is final for the purpose of appeal.<sup>6</sup> In the federal courts the rule is well established that a judgment or decree to be final must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance on appeal, the court below would have nothing to do but to execute the judgment or decree already entered.<sup>7</sup>

<sup>1</sup> *Camden & C. R. Co. v. Stewart*, 21 N. J. Eq. 484.

<sup>2</sup> *Morgan v. Ross*, 22 N. J. Eq. 584; *Chegary v. Scofield*, 5 N. J. Eq. 525. An appeal from an interlocutory order for an injunction forbidding directors of a corporation from hindering a new election of directors was dismissed, the appeal having been taken after the day for election had passed. *Camden & Atlantic R. Co. v. Elkins*, 37 N. J. Eq. 278. Where an order has been executed, the ob-

ject attained, and there is nothing upon which a judgment of reversal can operate, the appeal will be dismissed. *Coryell v. Holcombe*, 9 N. J. Eq. 650.

<sup>3</sup> *Phil. & Reading R. Co. v. Little*, 41 N. J. Eq. 519.

<sup>4</sup> *Davis v. Flag*, 35 N. J. Eq. 491, 496.

<sup>5</sup> *Rogers v. Paterson*, 4 Paige, 450.

<sup>6</sup> *Allison v. Drake (Ill.)*, 32 N. E. Rep. 537, 539.

<sup>7</sup> *Bostwick v. Brinkerhoff*, 106 U. S.

§ 941. The same subject continued.—“When the decree decides the right to the property in contest and directs it to be delivered up by the defendant to the complainant or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent and authorizes an appeal.”<sup>1</sup> A decree which determines the whole controversy between the parties, leaving nothing to be done except to carry it into execution, is a final decree for the purpose of appeal, and none the less so that the court retains the fund in controversy for the purpose of distributing it as decreed.<sup>2</sup> The term “final decision” in the Evarts Act prescrib-

3; *Grant v. Phoenix Mut. L. Ins. Co.*, 106 U. S. 429; *Dainese v. Kendall*, 119 U. S. 53; *Mower v. Fletcher*, 114 U. S. 128; *Ex parte Norton*, 108 U. S. 287; *St. Louis & Co. Ry. Co. v. Southern Express Co.*, 108 U. S. 24; *Parsons v. Robinson*, 122 U. S. 112; *Euston v. Houston & Co. Ry. Co.*, 44 Fed. Rep. 7, 9; *Cosby v. Buchanan*, 28 Wall. 420; *Talley v. Curtain*, 58 Fed. Rep. 4, 5. See, also, *Duff v. Carrier*, 55 Fed. Rep. 433. A decree is final which fulfills the whole purpose of the suit. *Winthrop Iron Co. v. Meeker*, 109 U. S. 180. “The doctrine that, after a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights, may be appealed from, is well established by the decisions of this court.” *Ex*

*parte Farmers' Loan & Trust Co.*, 129 U. S. 206, 213, and cases cited. In the same case, as to the granting of an appeal from an ancillary decree made pending an appeal from the principal decree, the court said:—“The question in such cases is not whether the order complained of is of a character decisive of questions that the parties are entitled to have reviewed in the appellate court, but whether the order or decree is of that final nature which alone can be brought to this court on appeal.” *Nelson, J.*, in *Northern Pac. R. Co. v. St. Paul & Co. Ry. Co.*, 47 Fed. Rep. 586, 587, said it was doubtful if an appeal could be taken from a decree of dismissal “without prejudice.”

<sup>1</sup> *Taney, C. J.*, in *Forgay v. Conrad*, 6 How. 204.

<sup>2</sup> *Lewisburg Bank v. Sheffy*, 104 U. S. 445; *Hoffman v. Knox*, 50 Fed. Rep. 484. It is not unusual in courts of equity to enter decrees determining the rights of parties, and the extent of the liability of one party to the other, giving at the same time a right to apply to the court for modifications and directions. It has never been doubted that such decrees are final. *Stovall v. Banks*, 10 Wall. 588.

ing the jurisdiction of the circuit court of appeals has the same meaning as the term "final decree" or "judgment" in the statute providing for appeals to the Supreme Court.<sup>1</sup>

§ 942. The same subject continued — In Massachusetts. "A decree is final which provides for all contingencies which may arise, and leaves no necessity for any further order of the court to give all the parties the entire benefit of decision;"<sup>2</sup> and no decree is a final one which leaves anything open to be decided by the court, and does not determine the whole case.<sup>3</sup> In a suit in equity an entry upon the docket, "Bill dismissed," is a final decree.<sup>4</sup>

§ 943. The same subject continued — New York court of chancery decisions. — A decree which finally decides and disposes of the whole merits of the case, and reserves no further questions or instructions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its further decision, is a final decree.<sup>5</sup> A decree which disposes of the question of costs, and gives all the consequential directions upon the coming in and confirma-

A decree which determines the principal matter in controversy between the parties is final although it directs certain accounts to be taken. *Dean v. Nelson*, 7 Wall. 842.

<sup>1</sup> *Brush Electric Co. v. California Electric Co.*, 7 U. S. App. 208; § 918, *supra*.

<sup>2</sup> *Gerrish v. Black*, 109 Mass. 474, 477.

<sup>3</sup> *Forbes v. Tuckerman*, 115 Mass. 115, 119, where the court said: — "It is well settled by the highest authorities that even when an order overruling a demurrer is followed by an order taking the bill for confessed, and referring the cause to a master for an account according to the prayer of the bill, neither is a final decree in any sense, but a mere interlocutory order in favor of the plaintiff, and on the return of the master's report the final decree may

be the other way." Per Gray, C. J. In Connecticut a judgment of the superior court sustaining a demurrer to a cross-bill, and at the same time giving leave to amend it, is not a final judgment from which a writ of error lies. *Treadway v. Coe*, 21 Conn. 283.

<sup>4</sup> *Snell v. Dwight*, 121 Mass. 343.

<sup>5</sup> *Mills v. Hoag*, 7 Paige, 18. A mere direction in the decree as to the manner of carrying it into effect, but which does not require the case to be again brought before the court for further directions, will not make the decree interlocutory. *Dickenson v. Codwise*, 11 Paige, 189. A decree is not final where the party in whose favor it is made cannot obtain any benefit therefrom without again setting the case down for hearing upon the equity reserved. *Johnson v. Everett*, 9 Paige, 636.

tion of the master's report by the usual order in the clerk's office, is a final decree,<sup>1</sup> although the case is subsequently brought before the court upon exceptions to the master's report.<sup>2</sup>

§ 944. The same subject continued — In Virginia.— In Virginia it has been repeatedly decided that a final decree is one which makes an end of the cause, which decides the whole matter in contest, costs and all, leaving nothing to be done to give completely the relief contemplated by the court in the cause.<sup>3</sup>

<sup>1</sup> *Coithe v. Crane*, 1 Barb. Ch. 21; *Quackenbush v. Leonard*, 10 Paige, 181; *Mills v. Hoag*, 7 Paige, 18; *Johnson v. Everett*, 9 Paige, 686.

<sup>2</sup> *Taylor v. Read*, 4 Paige, 561. A decree on a bill for a specific performance on the coming in of the master's report as to the quantity of land to be conveyed and the payments to be made, directing the balance due to be paid, and a conveyance to be executed, is a final decree. *Travis v. Waters*, 1 Johns. Ch. 85.

<sup>3</sup> *Rawlings v. Rawlings*, 75 Va. 76; *Barker v. Jenkins*, 84 Va. 895; s. c., 6 S. E. Rep. 459, and cases cited; *Welsh v. Solenberger*, 85 Va. 441; s. c., 8 S. E. Rep. 91; *Parker v. Logan*, 82 Va. 376. In West Virginia the court discussed the distinction between interlocutory and final decrees as follows:—"The characteristics of a final decree as contradistinguished from an interlocutory decree have been so often pointed out by this court, and are now so familiar to the profession, that little need be said upon the subject in this opinion. According to the uniform decisions of this court a decree which disposes of the whole subject, gives all the relief that is contemplated, and leaves nothing to be done by the court, is only to be regarded as final. On the other hand every decree which leaves

anything in the cause to be done by the court is interlocutory as between the parties remaining in court." *Ryan v. McLeod*, 82 Gratt. 876. If anything, no matter what, remains to be done by the court in the cause, and the parties, nor any of them, are not put out of court, the decree is not final but interlocutory. No case has been cited by this court, said Judge Baldwin in *Cooke v. Gilpin*, 1 Rob. (Va.) 22, in which the decree has been held to be final, where the judicial action of the court in the cause has not been exhausted. He used the expression, 'further action of the court in the cause,' he said, to distinguish it from that action of the court which is common to both final and interlocutory decrees, and which may be regarded as not in, but beyond, the cause, namely, such measures as are necessary to carry the decree into execution, and which do not affect the merits of the case as previously adjudicated. See, also, *Ryan v. McLeod*, 82 Gratt. 867; *Rawlings v. Rawlings*, 75 Va. 76; *Jameson v. Major* (West Va.), 9 S. E. Rep. 480." *Noel's Adm'r v. Noel's Adm'r* (West Va.), 9 S. E. Rep. 585. See, also, *Core v. Strickler*, 24 West Va. 698; *Fowler v. Lewis' Adm'r* (West Va.), 14 S. E. Rep. 447, 458.

§ 945. **Final decrees illustrated.**—A decree is final for the purpose of appeal when it adjudicates all matters within the pleadings, although it orders an accounting in respect to operations of the defendants during the pendency of the suit.<sup>1</sup> Where parties are entirely dismissed from a case by a decree it is final and authorizes an immediate appeal, although other matters are retained in which they as parties have no interest.<sup>2</sup> A decree fixing the priority of claims against an insolvent corporation and directing the sale of its property for their payment is a final decree.<sup>3</sup> A decree setting aside an assignment and ordering a reference to ascertain amounts and priorities of creditors' claims is final.<sup>4</sup> A decree affirming the sale by a receiver of property of the drainage fund held in trust by the city of New Orleans to satisfy the claim of a judgment creditor of the fund was held to be a final decree.<sup>5</sup> A decree in a suit for foreclosure of a railroad mortgage, that the claim of an intervening creditor to an interest in certain locomotives in the possession of the receiver and in use on the road was just, and entitled to priority over the mortgage debt, is a final decree, upon a matter distinct from the general subject of the litigation.<sup>6</sup> An order authorizing a receiver of a railroad company to borrow a sum of money on his certificates and directing that the same shall be a first lien on the property, made after a decree of foreclosure and sale of the property and pending an appeal therefrom, is a final

<sup>1</sup> *Winthrop Iron Co. v. Meeker*, 109 U. S. 180, distinguished from patent cases.

<sup>2</sup> *Grant v. East & West R. Co.* (C. C. A.), 50 Fed. Rep. 795; *Hill v. Railroad Co.*, 140 U. S. 52. In the case first cited the court said:—"In all the cases cited and reviewed by Mr. Justice Blatchford in delivering the opinion of the court in *Iron Co. v. Martin*, 132 U. S. 91, in support of their decision in that case, the decrees, though decisive of the main issue between the parties thereto, still left for further settlement before the master other and dependent issues between the same parties."

<sup>3</sup> *Hoffman v. Kox*, 50 Fed. Rep. 484, where the court said:—"The bringing of the fund into court was for the final distribution as decreed and not to be held pending the ascertainment of the principles upon which it should be distributed. *Hill v. Railroad Co.*, 140 U. S. 52; *Bank v. Sheffy*, 140 U. S. 445."

<sup>4</sup> *Talley v. Curtain*, 58 Fed. Rep. 4, 5.

<sup>5</sup> *New Orleans v. Peake*, 3 U. S. App. 408, holding that the city of New Orleans had an appealable interest in the decree.

<sup>6</sup> *Trust Co. v. Grant Locomotive Works*, 135 U. S. 307.

decree.<sup>1</sup> An order of the circuit court reviving a suit in the name of the executor of the plaintiff, on a bill of revivor after decree therein, and ordering that the executor have the full benefit of the decree and power to enforce the same, is a final decree.<sup>2</sup>

§ 946. The same subject continued.— A decree in a suit for foreclosure, fixing and allowing compensation to the trustee and dismissing exceptions thereto, is a final decree.<sup>3</sup> A decree made by the circuit court, directing the payment of costs and expenses out of a fund in court to the complainant—the fund in the meantime remaining in the court in course of administration—is *pro tanto* a final decree from which an appeal will lie.<sup>4</sup> A decree dismissing a bill and adjudging the equities in favor of the cross-complainant is final for the purpose of appeal, though leave is given to apply for a further incidental order.<sup>5</sup> A decree in a suit to compel a railroad company to do an express company's business, which requires the carriage and fixes the compensation, and adjudges costs and awards execution, is a final decree, although leave is given to parties to apply for a modification of the rates, and a supplemental order is made relating to the settlement of the accounts which accrued pending the suit.<sup>6</sup> A decree that certain deeds should be set aside as fraudulent and void; that certain lands and slaves should be delivered up to the complainant; that one of the defendants should pay a certain amount of money to the complainant; that the complainant should have execution for these several matters; that the master should take an account of certain matters; and so much of the bill as related to those matters to be retained and the remainder dismissed,— was held to be a final decree.<sup>7</sup> Where the circuit court decreed that the defendants pay into the clerk's office, on or before November 1st, the sum due, "or, in default thereof, the court will at the next

<sup>1</sup> *Ex parte Farmers' Loan & Trust Co.*, 129 U. S. 206.

<sup>5</sup> *Elliott v. Sackett*, 108 U. S. 182.

<sup>2</sup> *Terry v. Sharon*, 181 U. S. 40.

<sup>6</sup> *St. Louis &c. Ry. Co. v. Southern Express Co.*, 108 U. S. 24; *Missouri*

<sup>3</sup> *Williams v. Thomson*, 111 U. S. 684.

*&c. Ry. Co. v. Dinsmore*, 108 U. S. 80.

<sup>7</sup> *Forgay v. Conrad*, 6 How. 201.

<sup>4</sup> *Trustees v. Greenough*, 105 U. S. 527.



term of this court appoint a receiver," the decree was final.<sup>1</sup> A decree in favor of complainant for a perpetual injunction with costs is a final decree, although it does not in terms dismiss a cross-bill.<sup>2</sup> A decree directing a sale of trust property, and that the proceeds be brought into court, is a final decree.<sup>3</sup> A decree granting the prayer of a bill to perpetuate testimony, and appointing commissioners, is a final decree.<sup>4</sup>

**§ 947. The same subject continued — Foreclosure sales.**

A decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree.<sup>5</sup> In a suit to set aside proceedings of foreclosure and to obtain a conveyance of the mortgaged property, a decree is final for the purpose of appeal which denies the relief and orders the sale to go on and the surplus to be paid to the mortgagor.<sup>6</sup> A decree that mortgaged premises shall be sold at public auction by the marshal unless the amount found due for arrears of interest, with taxed costs, shall be paid before the day of sale, is

<sup>1</sup> *Wabash & Erie Canal Co. v. Beers*, 1 Black, 54.

<sup>2</sup> *French v. Shoemaker*, 13 Wall. 86.

<sup>3</sup> *Washington & C. R. Co. v. Washington*, 7 Wall. 575. The Supreme Court of the District of Columbia at special term confirmed a sale of real estate by a trustee, without giving notice to interested parties. Those parties subsequently appeared, and on their motion, after notice and hearing, the sale was vacated and the trustee at whose request it was made was removed. It was held that an appeal lay from the decree to the general term of the court. The court said:—"It was not an appeal simply from an order refusing to set aside the decree of confirmation, but one that involved the integrity of the order confirming the sale, and, therefore, the merits of the whole case made by the petition." *Kenady v. Edwards*, 184 U. S. 124. An order, made upon the hearing of a demur-

rer, granting relief upon certain conditions to be fulfilled by plaintiff, and dismissing the bill in the (future) event of non-compliance, though wholly irregular, is not a final decree from which an appeal will lie, but merely the foundation of one. *Jones v. Craig*, 127 U. S. 214. Where an order taking the bill as confessed by one defendant and directing that the cause be proceeded in thenceforth *ex parte* as to him was entered before the decree was made sustaining the demurrer of the other defendant and dismissing the bill as against him, that decree is final as to the latter, and one from which the plaintiff can appeal. *Stewart v. Masterson*, 181 U. S. 151.

<sup>4</sup> *Jerome v. Jerome*, 5 Conn. 853.

<sup>5</sup> *Grant v. Phoenix Ins. Co.*, 106 U. S. 439, 481, and cases there cited; *Parsons v. Robinson*, 122 U. S. 112; *Ray v. Law*, 3 Cranch, 172.

<sup>6</sup> *Ex parte Norton*, 108 U. S. 337.

final.<sup>1</sup> A decree in a foreclosure suit, ascertaining the amount due and directing payment within a year, and providing for an order of sale in default of payment, is a final decree.<sup>2</sup> In Louisiana a summary proceeding to foreclose a mortgage, which is in substance a decree of foreclosure and sale, is a final decree, and an appeal lies from it.<sup>3</sup>

§ 948. **Final decree on a collateral matter.**— A decree, to be a final one within the meaning of statutes providing for appeals, need not necessarily be one that disposes of all the issues presented in the case finally, but may include a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally adjudicating that controversy.<sup>4</sup> Thus where the licensee of a patent brought a suit for infringement, joining the owner as a co-complainant, and the latter moved that the cause be dismissed as to him because brought without his authority, and issues of law and fact were presented by the motion distinct from the general issues in the case, an order overruling the motion was held to be final and appealable.<sup>5</sup>

<sup>1</sup> *Bronson v. La Crosse & Co. R. Co.*, 2 Black, 528.

<sup>2</sup> *Ex parte Milwaukee & Co. R. Co.*, 2 Wall. 440.

<sup>3</sup> *Marin v. Lalley*, 17 Wall. 14. A substantial error, to the prejudice of one of the parties, may originate in a decree distributing the proceeds of a sale under a decree of foreclosure; and no question can be raised against the right to appeal from such a decree. *Chicago & Co. R. Co. v. Fosdick*, 106 U. S. 82.

<sup>4</sup> *Brush Electric Co. v. Electric Imp. Co. (C. C. A.)*, 51 Fed. Rep. 557, 561. It would seem, also, that the importance of this collateral matter should be considered. *Terry v. Sharon*, 181 U. S. 46; s. c., 9 S. Ct. Rep. 705. See, also, *Bronson v. Railroad Co.*, 2 Black, 580; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 209; s. c., 10 S. Ct. Rep. 736; *Williams v. Morgan*,

111 U. S. 689; s. c., 4 S. Ct. Rep. 688; *Trustees v. Greenough*, 105 U. S. 527; *Central Trust Co. v. Marietta & Co. Ry. Co.*, 48 Fed. Rep. 851.

<sup>5</sup> *Brush Electric Co. v. Electric Imp. Co.*, 51 Fed. Rep. 557, where Knowles, D. J., points out that "these questions would not be again presented." In regard to motions to dismiss by a party whose name is used without authority, see § 449, *supra*; *Daniels v. Daniels*, 9 Colo. 133; s. c., 10 Pac. Rep. 661; *Lithographing Co. v. Crane*, 12 N. Y. Supl. 885; *Stephens v. Hall*, 10 N. Y. Supl. 758. In *Stich v. Goldner*, 88 Cal. 609, an appeal was sustained from a final judgment against an intervenor. The same point was ruled the same way in *People v. Pfeiffer*, 59 Cal. 90; *Coburn v. Smart*, 58 Cal. 743, and *Henry v. Insurance Co.*, 16 Colo. 179; s. c., 26 Pac. Rep. 319. On the exact question raised in the case

§ 949. **Interlocutory decrees — Generally.**— Where a decree leaves something more to be done than the mere ministerial execution of it as rendered, it is interlocutory, and not final for the purpose of appeal, even though it settles the equities of the bill.<sup>1</sup> A decree that money shall be paid into court, or that property shall be delivered to a receiver, or that property held in trust shall be delivered to a new trustee appointed by the court for preservation pending the suit, is interlocutory merely, and no appeal lies from it.<sup>2</sup>

§ 950. **Interlocutory decrees illustrated.**— A decree declaring the jurisdiction of the court, prior to proceedings on the merits, is not a final decree for the purpose of an appeal.<sup>3</sup> A decree will not be held final, though at the head of the paper on which it was written are the words "Final decree," and the cause was thereafter left off the docket by the clerk, where there was no order of the court directing it to be removed as an ended cause, and there is nothing in the decree itself showing that the court intended to put an end to the cause.<sup>4</sup> A decree rendered at the suit of a stockholder removing the liquidators of a corporation because they had interests adverse thereto, and appointing receivers having the powers and duties of liquidators in addition to the usual functions of receivers, is not a final decree as to the displaced liquidators from which they can appeal either in their official or individual capacities.<sup>5</sup> On a bill by a junior mortgagee a decree was made "interlocutory" in express terms, establishing his right to redeem the prior mortgage, but postponing a sale and determination of the amounts due "for further order and decree." It was held that the decree was not final.<sup>6</sup>

stated in the text, see, also, *May v. Hardin's Ex'rs*, 18 B. Mon. 844. A decree for alimony *pendente lite* has been classed as a final decree, although the issues in the pleadings are not involved in awarding the same. *Sharon v. Sharon*, 67 Cal. 195; s. c., 7 Pac. Rep. 456, 635; 8 Pac. Rep. 709.

<sup>1</sup> *Dodge v. Twell*, 185 U. S. 235, and cases cited.

<sup>2</sup> *Forgay v. Conrad*, 6 How. 201.

<sup>3</sup> *Benjamin v. Dubois*, 118 U. S. 46.

<sup>4</sup> *Ward v. Funsten*, 86 Va. 359; s. c., 10 S. E. Rep. 415.

<sup>5</sup> *Dufour v. Lang* (C. C. A.), 54 Fed. Rep. 918.

<sup>6</sup> *Burlington & Co. Ry. Co. v. Simmons*, 128 U. S. 52. A receiver of the rents and profits of property was appointed in a foreclosure suit, and a writ of assistance issued to put him in possession. The occupant, not a party to the suit, brought a petition

§ 951. **The same subject continued.**—In a partition suit a decree settling the several interests of the parties in the property and referring it to a master, to proceed to a partition according to law, under the direction of the court, is not a final decree. The final relief sought is the setting off to the complainant in severalty his share of the property in money or in kind.<sup>1</sup> A decree in a foreclosure suit which does not order a sale of the property, but overrules the defense set forth in a cross-bill, declares that the complainant is the owner of the debt secured, and refers the case to an auditor to ascertain the amount due thereon, amount of liens, etc., is not a final decree.<sup>2</sup> A decree entered in proceedings to foreclose a railroad mortgage, which orders a sale “at such time and place as the court may hereafter determine,” and refers the cause to a master with instructions to ascertain the extent and amount of prior and junior liens, prepare and report detailed statements of the several properties, and an order of sale and form of advertisement therefor, is not final for the purpose of appeal.<sup>3</sup> A decree referring it to a master to take an account upon evidence and examination of parties, and to decide allowances and report to the court, is not final.<sup>4</sup> Where the circuit court decreed that the complainants were entitled to two-sevenths of certain property, and referred the matter to a master to take and report an account of it, and then reserved all other matters in controversy between the parties until the coming in of the master’s report, it was held not a final decree for the purpose of an appeal.<sup>5</sup> A decree of foreclosure adjudging priority to certain kinds of claims, and referring to the master the determination of the amounts of the same and holders thereof, though final as to the mortgagor’s interest, is interlocutory as to the other matters in-

to enjoin the execution of the writ, which was overruled. It was held not to be a final decree, and an appeal was dismissed. *Hentig v. Page*, 102 U. S. 219. An order of process to carry into execution a final decree is not itself a final decree for the purpose of appeal. *Callan v. May*, 2 Black, 541. See, also, *McMicken v. Perin*, 20 How. 133.

<sup>1</sup> *Green v. Fisk*, 103 U. S. 518; *Green v. Fisk*, 103 U. S. 520.

<sup>2</sup> *Grant v. Phoenix Mut. L. Ins. Co.*, 106 U. S. 429.

<sup>3</sup> *Parsons v. Robinson*, 122 U. S. 112.

<sup>4</sup> *Beebe v. Russell*, 19 How. 288; *Farrelly v. Woolfcock*, 19 How. 288.

<sup>5</sup> *Perkins v. Fourniquet*, 6 How. 206.

volved.<sup>1</sup> A decree of a circuit court that all the moneys recovered under a decree made at a prior term be distributed, and referring the case to a master to state an account, is not a final decree.<sup>2</sup> In proceedings for foreclosure, an order of the Supreme Court of the District of Columbia in general term, remanded to the special term, for hearing in the first instance an application of the receiver for an order on the occupant of one of the houses in question to attorn and pay rent to him, is an interlocutory order from which no appeal can be taken.<sup>3</sup> A decree of sale which leaves the amount of the debt and the quantity of property to be sold for future determination is not a final decree.<sup>4</sup> A bill was filed by residuary legatees against an executor for their portions of the estate. After reference to a master, report and exceptions overruled, the court decreed that complainants should have execution for the sum reported in the hands of the executors; and as to the residue of the debts due the estate, as soon as the same or part of them should be collected, the amount should be paid into court for distribution, to be made under the direction of the court. It was held that this was an interlocutory decree and not subject to appeal.<sup>5</sup>

§ 952. The same subject continued.—A decree that the plaintiff recover of the defendant the highest market value of certain bonds to be ascertained by the court in special term is

<sup>1</sup>Porter v. Pittsburgh Bessemer Steel Co., 120 U. S. 649.

<sup>2</sup>Ogilvie v. Knox Ins. Co., 2 Black, 589. Where the basis of the decree, embracing the equities of the bill, is found, but the distribution among the parties in interest depends upon facts to be reported by the master, until the court shall have acted upon his report and sanctioned it the decree is not final. Craighead v. Wilson, 18 How. 199. A decree of the circuit court setting aside a deed made by a bankrupt before his bankruptcy; directing the trustees under the deed to deliver over to the assignee in bankruptcy all the prop-

erty remaining undisposed of in their hands, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously made and paid away to the creditors; directing an account to be taken of these last-mentioned sums in order to a final decree,—is not a final decree for the purpose of appeal. Pulliam v. Christian, 6 How. 209.

<sup>3</sup>Grant v. Phoenix Mut. L. Ins. Co., 121 U. S. 118.

<sup>4</sup>North Carolina R. Co. v. Swasey, 23 Wall. 405.

<sup>5</sup>Young v. Smith, 15 Pet. 267.

not a final decree.<sup>1</sup> An order to pay a fund into the registry of the court for preservation during the pendency of the litigation as to its ownership is an interlocutory and not a final decree.<sup>2</sup> A decree of affirmance by the circuit court on appeal from the district court without taxation of costs and without specifying the sum for which it is rendered is not final for the purpose of appeal.<sup>3</sup> A decree in equity setting aside a conveyance of personalty and of real estate, appointing a receiver and ordering a sale of what the defendant had not parted with, and an accounting for the proceeds of the personalty he had disposed of, and that the receiver pay certain arrears of alimony due the plaintiff and hold the balance subject to the order of the court as to alimony subsequently to accrue, is not a final order from which an appeal can be taken, for there still remains to be determined what personal property had been parted with and what was its value, and the amount of the proceeds to be accounted for.<sup>4</sup> A decree which simply set aside one sale and ordered another is not final to give the purchaser a right of appeal.<sup>5</sup> A decree in a State court that an injunction of the court below be dissolved is not final for an appeal.<sup>6</sup> A decree dissolving an injunction, where the bill itself is not dismissed, gives no right of appeal.<sup>7</sup> A restraining order in an action for an injunction "to operate until the further order of this court" was held to be an interlocutory order only.<sup>8</sup> Where a temporary injunction was granted against a judgment at law, and afterwards the plaintiffs in the suit at law appeared and answered denying the fraud, etc., and the court without dismissing the bill or making the injunction perpetual granted a new trial at law, it was considered that the case was still pending, and an appeal from the decree granting a new trial was dismissed.<sup>9</sup> A decree granting an injunction restraining further trespasses and an account

<sup>1</sup> *Follansbee v. Ballard Paving Co.*, 101 U. S. 410. *Waukees &c. R. Co.*, 1 Wall. 685; s. c., 8 Wall. 196.

<sup>2</sup> *Louisiana Nat. Bank v. Whitney*, 121 U. S. 284.

<sup>3</sup> *Wheeler v. Harris*, 18 Wall. 51.

<sup>4</sup> *Lodge v. Twell*, 135 U. S. 232.

<sup>5</sup> *Butterfield v. Usher*, 91 U. S. 246, distinguishing *Blossom v. Mil-*

<sup>6</sup> *Moses v. Mobile*, 15 Wall. 387.

<sup>7</sup> *McCollum v. Eager*, 2 How. 61.

<sup>8</sup> *Hadley v. Ulrich* (Okla.), 38 Pac. Rep. 705.

<sup>9</sup> *Lea v. Kelly*, 15 Pet. 212.

of damages already suffered is not final, and is not appealable so long as the account remains to be taken.<sup>1</sup> It makes no difference that the same decree dismissed the defendant's cross-complaint. His right to appeal from that will be preserved with and accompany the main decree.<sup>2</sup> A decree of the highest court of equity of a State, affirming the decretal order of an inferior court of equity of the same State, refusing to dissolve an injunction granted on the filing of the bill, is not a final decree for the purpose of appeal.<sup>3</sup> A decree on a cross-bill is not final for the purpose of appeal.<sup>4</sup>

§ 953. **The same subject continued — Injunction and account.**— A decree in a suit for infringement of a patent, establishing infringement, awarding an injunction, and for an account and a reference to a master, is interlocutory and not final.<sup>5</sup> Consequently so long as the case is in that stage, or even after a rehearing has been refused,<sup>6</sup> the decree does not prevent an inquiry into the validity of the patent in an independent suit in the same<sup>7</sup> or in another court.<sup>8</sup>

§ 954. **Taking appeals in the federal courts.**— In the federal courts an appeal must be taken by a judge who has power to sign a citation.<sup>9</sup> An appeal from a decree of the circuit court is not "taken" until it is in some way presented to the court which made the decree appealed from, so as to

<sup>1</sup> *Keystone Iron Co. v. Martin*, 133 U. S. 91; *Winters v. Ethell*, 132 U. S. 207.

<sup>2</sup> *Winters v. Ethell*, 132 U. S. 207, 210.

<sup>3</sup> *Gibbons v. Ogden*, 6 Wheat. 448. A decree upon motion to dissolve an injunction which does not dispose of the bill is not final for the purpose of an appeal. *Verden v. Coleman*, 18 How. 86; *Thomas v. Wooldridge*, 23 Wall. 283.

<sup>4</sup> *Ayres v. Carver*, 17 How. 591; *Ex parte Railroad Co.*, 95 U. S. 221.

<sup>5</sup> *Harmon v. Struthers*, 48 Fed. Rep. 200; *Chemical Works v. Hecker*, 2 Ban. & A. 351; *Barnard v. Gibson*, 7 How. 650; *Humiston v. Stainthorp*, 2 Wall. 106. It may be opened for

rehearing upon additional proofs at a subsequent term. *Harmon v. Struthers*, *supra*. See, also, to the same effect, *Fourniquet v. Perkins*, 16 How. 82.

<sup>6</sup> *Harmon v. Struthers*, 48 Fed. Rep. 260.

<sup>7</sup> *Harmon v. Struthers*, 48 Fed. Rep. 260.

<sup>8</sup> *Chemical Works v. Hecker*, 2 Ban. & A. 351.

<sup>9</sup> *Sage v. Railroad Co.*, 96 U. S. 713; *Barrel v. Transportation Co.*, 3 Wall. 424; *Pierce v. Cox*, 9 Wall. 786. The Supreme Court of the District of Columbia, while sitting in special term, can allow an appeal to the United States Supreme Court from a final decree of that court

put an end to its jurisdiction over the case.<sup>1</sup> Cross-appeals must be prosecuted like other appeals, and therefore a cross-appeal is not taken until brought to the attention of the court whose decree it questions.<sup>2</sup> A party wishing an appeal should make an application for its allowance in open court or to the judge at his chambers, and should name his securities.<sup>3</sup> The prayer for an appeal and the order allowing it constitute a valid appeal; the bond is not essential to it.<sup>4</sup> No formal order of allowance is necessary. The court by taking security on an appeal, followed when necessary by signing the citation, allows an appeal.<sup>5</sup> Where an appeal becomes inoperative by reason of the failure to docket it in time, the subsequent signing of a citation is, in effect, the allowance of a new appeal.<sup>6</sup> An appeal will not be dismissed because the appellees are not named in the order allowing it, but are described as

rendered at general term. *Richards v. Mackall*, 118 U. S. 539.

<sup>1</sup> *Credit Co. v. Ark. Central Ry. Co.*, 128 U. S. 268. An appellant may retain a new solicitor to prosecute an appeal. *McLaren v. Charrier*, 5 Paige, 580, 584. In New Jersey it is the notice of appeal filed in the court of chancery that is the appellate act giving the court of appeals cognizance of the case. The petition of appeal subsequently filed in the appellate court is only in the nature of a pleading tending to form an issue. *Barton v. Long*, 45 N. J. Eq. 160; *Phillips v. Pullen*, 45 N. J. Eq. 157, 158.

<sup>2</sup> *Farrar v. Churchill*, 185 U. S. 612.

<sup>3</sup> *Mussina v. Cavazos*, 20 How. 280.

<sup>4</sup> *Edmonson v. Bloomshire*, 7 Wall. 306. The rule of the district court requiring an appeal to be in writing and filed with the clerk may be dispensed with by that court. *Winslow v. Wilcox*, 105 U. S. 447.

<sup>5</sup> *Brandies v. Cochrane*, 105 U. S. 263; *Sage v. Central R. Co.*, 96 U. S. 712; *Washington & Co. R. Co. v. Washington*, 7 Wall. 575; *Brown v. McConnell*, 124 U. S. 489. The order-book

of the circuit court may be amended by the judge's direction by the insertion of an appeal therein, after the term is over, where an appeal was actually taken. *Hudgins v. Kemp*, 18 How. 580. The acceptance, subsequent to an appeal in open court, of an appeal bond, to perfect the appeal, by the district judge, cannot be considered as the allowance of a new appeal at that date, where it was after the term at which the decree was rendered, and no citation was ever issued or served. *Radford v. Folsom*, 128 U. S. 725. The acceptance of a bond more than two years after a decree was entered cannot have the effect of an allowance of a new appeal. *Killian v. Clark*, 111 U. S. 784. A decree in favor of certain claimants sufficiently designates them, for the purpose of appeal by adverse parties, by referring to a prior order in which they are named. *Miltenberger v. Lozansport & Co. Ry. Co.*, 106 U. S. 286.

<sup>6</sup> *Stewart v. Masterson*, 124 U. S. 493; *Brown v. McConnell*, 124 U. S. 489.



"the other parties" to the decree, if the bond on the appeal is given to the appellees by name.<sup>1</sup> An order for an allowance of an appeal may be made *nunc pro tunc*.<sup>2</sup> The want of record evidence in the circuit court that an appeal was prayed is no ground of dismissal; the certificate of the clerk that it was so prayed is all that is required.<sup>3</sup> The mere allowance of an appeal to the Supreme Court without any steps taken to perfect the same does not divest the circuit court of jurisdiction, and it may at the same term vacate the order of allowance and grant an appeal to the circuit court of appeals.<sup>4</sup> *Mandamus* will lie to compel an appeal in a proper case.<sup>5</sup>

§ 955. The same subject continued — Citation.— If an appeal is allowed in open court at the term at which it is rendered the security may be taken by the court and no citation is necessary;<sup>6</sup> but if the security is not given until after the term is over, a citation must be issued and served, unless it has been in some proper form waived.<sup>7</sup> Where an appeal bond

<sup>1</sup> Richardson v. Green, 180 U. S. 104.

<sup>2</sup> United States v. Vigil, 10 Wall. 428; Chicago v. Bigelow, 7 Wall. 109.

<sup>3</sup> Hudgins v. Kemp, 18 How. 530.

<sup>4</sup> Aspen Min. & Sm. Co. v. Billings (U. S.), 14 S. Ct. Rep. 4, 5, pointing out that there is nothing to the contrary in Evans v. Bank, 184 U. S. 331. See, also, Goddard v. Ordway, 101 U. S. 745; Keyser v. Farr, 105 U. S. 265; § 881, *supra*.

<sup>5</sup> *Ex parte* Parker, 120 U. S. 787; United States v. Adams, 6 Wall. 101; United States v. Gomez, 3 Wall. 750; *Ex parte* Railroad Co., 95 U. S. 231. See *Ex parte* Virginia Commissioners, 112 U. S. 177.

<sup>6</sup> Haskins v. St. Louis &c. Ry. Co., 109 U. S. 106; Reily v. Lamar, 2 Cranch, 844; Brockett v. Brockett, 2 How. 238; Milner v. Meek, 95 U. S. 252; Dodge v. Knowles, 114 U. S. 436; United States v. Vigil, 10 Wall. 428; Chicago &c. R. Co. v. Blair, 100 U. S. 661.

<sup>7</sup> Haskins v. St. Louis &c. Ry. Co., 109 U. S. 106; West v. Irwin (C. C. A.), 54 Fed. Rep. 414; Hewitt v. Filbert, 116 U. S. 143; Richardson v. Green, 180 U. S. 104; Garrison v. Cass County, 5 Wall. 823; Vansant v. Electro-Magnetic &c. Co., 99 U. S. 213; First Nat. Bank v. Omaha, 96 U. S. 787. A citation is necessary when an appeal is allowed in open court at a term subsequent to the rendition of the decree, though the appellees be then present by their solicitors. Chicago & Pac. R. Co. v. Blair, 100 U. S. 661. In Jacobs v. George (Nov. 27, 1893), 14 S. Ct. Rep. 159, 160, Chief Justice Fuller summarized the law and practice relating to citations as follows:— "(1) Where an appeal is allowed in open court and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary. (2) Where the appeal is allowed at the term of the decree or judgment, but not per-

was approved by the chief justice of the court and filed with the clerk during the term, but it did not appear to have been done while the court was actually in session, a citation was held to be necessary.<sup>1</sup> An indorsement by the counsel for the appellees of his approval of a bond filed after the term at which the appeal was allowed is equivalent to and dispenses with a citation in form.<sup>2</sup> An order of the Supreme Court served upon the appellee, to appear and argue the cause if he sees fit, is the legal equivalent of a citation.<sup>3</sup>

**§ 956. Citation on appeals continued—Service and waiver.**—Service of citation upon the attorney of a party is as valid as if served on the party himself.<sup>4</sup> Where a party dies before the appeal is allowed and prosecuted, the suit should be revived in the subordinate court, and the citation,

fectured until after the term, a citation is necessary to bring in the parties; but if the appeal be docketed here at our next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued by leave of this court, although the time for taking the appeal has elapsed. (3) Where the appeal is allowed at a term subsequent to that of the decree or judgment, a citation is necessary but may be issued properly returnable, even after the expiration of the time for taking the appeal, if the allowance of the appeal were before. (4) But a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the next ensuing term of this court, and not waived, the appeal becomes inoperative. *Hewitt v. Filbert*, 116 U. S. 142; *Richardson v. Green*, 130 U. S. 104; *Evans v. Bank*, 134 U. S. 330; *Green v. Elbert*, 137 U. S. 615."

<sup>1</sup> *Vansant v. Electro-Magnetic & Co.*, 99 U. S. 212. The allowance by the Supreme Court of the District of

Columbia, while in session at special term, of an appeal from a final decree of that court rendered at general term, does not do away with the necessity of a citation. The citation may be signed by any justice of that court. *Richards v. Mackall*, 118 U. S. 539.

<sup>2</sup> *Goodwin v. Fox*, 120 U. S. 775.

<sup>3</sup> *Dodge v. Knowles*, 114 U. S. 486. A citation to a partnership should be addressed to the parties individually. *United States v. Hopewell* (C. C. A.), 51 Fed. Rep. 798. But the mistake if objected to may be cured by a new citation in proper form. *United States v. Hopewell* (C. C. A.), 51 Fed. Rep. 798, 800; *Moore v. Simonds*, 100 U. S. 145; *Estis v. Trabue*, 128 U. S. 225; s. c., 9 S. Ct. Rep. 58. And where the appellees appear generally, without taking any objection, such irregularity becomes immaterial. *United States v. Hopewell* (C. C. A.), 51 Fed. Rep. 798, 800.

<sup>4</sup> *United States v. Curry*, 6 How. 106; *Scruggs v. Memphis & Co. R. Co.*, 104 U. S. 264. Although the attorney had been paid and discharged. *United States v. Curry*, 6 How. 106.

as a matter of course, should be addressed to the proper party in the record at that time.<sup>1</sup> An appellant cannot have an appeal dismissed on the ground that no citation was issued.<sup>2</sup> Where a citation was actually issued upon the allowance of an appeal, the omission to serve it before the first day of the term does not avoid the appeal, and a new citation may be ordered to be issued and served.<sup>3</sup> A citation, if security is taken out of court, or after the term, is not jurisdictional, and if by accident it has been omitted, a motion to dismiss the appeal will not be granted until an opportunity to give the requisite notice has been furnished.<sup>4</sup> A general appearance by the appellee is a waiver of a citation,<sup>5</sup> and cannot at a subsequent term be altered by the clerk to a special appearance, nor be withdrawn without leave of the court.<sup>6</sup> The attorney of record may waive service and acknowledge notice on the citation.<sup>7</sup>

**§ 957. Amendment of petition of appeal.**—Where an appeal by the United States was irregularly taken in the name of the collector of a port, the irregularity having been suggested at the hearing in the appellate court, the latter allowed a motion to amend the petition of appeal and signature thereto and the assignment of errors, the appellee, in open court, having consented to the amendment.<sup>8</sup>

<sup>1</sup> *Bigler v. Waller*, 12 Wall. 142.

<sup>2</sup> *Pierce v. Cox*, 9 Wall. 786.

<sup>3</sup> *Dayton v. Lash*, 94 U. S. 112.

<sup>4</sup> *Richardson v. Green*, 130 U. S. 104, where the appearance was special for the purpose of moving to dismiss; *Dodge v. Knowles*, 114 U. S. 496. See, also, *Evans v. State Bank*, 134 U. S. 330; *Chicago & C. R. Co. v. Blair*, 100 U. S. 661; *Richards v. Mackall*, 113 U. S. 539. That the record does not show that a citation has been issued and served is no ground for dismissing the case. It may be shown *aliunde*. *Obiter*, *Hudgins v. Kemp*, 18 How. 520.

<sup>5</sup> *Richardson v. Green*, 130 U. S. 104; *Pierce v. Cox*, 9 Wall. 786; *Sage v. Central Pac. R. Co.*, 96 U. S. 712;

*Freeman v. Clay* (C. C. A.), 48 Fed. Rep. 849.

<sup>6</sup> *United States v. Armejo*, 3 Wall. 392. When a party intends to move for dismissal of an appeal for want of a citation the appearance of counsel should be entered only for that purpose. *Buckingham v. McLean*, 18 How. 150.

<sup>7</sup> *Bigler v. Waller*, 12 Wall. 142.

<sup>8</sup> "By the appeal taken in behalf of the United States by the district attorney this court acquired jurisdiction of the case, and has power to allow amendments in regard to the officer by whom or in whose name the appeal was claimed. When any question is made as to the allowance of such an amendment, the usual

§ 958. **Security on appeal—In the federal courts.**—The United States Revised Statutes provide that every justice or judge signing a citation on any writ of error or appeal shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages.<sup>1</sup> An appeal will not be dismissed for omission to file a bond, but the court will grant a reasonable time in which to furnish one.<sup>2</sup> Where the bond given on an appeal became inoperative by failure to docket the appeal in time, a subsequent appeal, if not accompanied by another bond, will be dismissed unless the appellant shall, within a time allowed, file a proper bond.<sup>3</sup> Where the appeal was taken in open court, and no citation was necessary, and the record has been duly filed, the appellant may be allowed on the hearing to file a bond *nunc pro tunc*.<sup>4</sup>

§ 959. **The same subject continued.**—Where there are several parties in a case below, it is not necessary for them all to join in the appeal bond. It is sufficient if they all appeal, and the bond be approved by the court.<sup>5</sup> When approved by the judge it stands as security for all the appellees, al-

and proper practice is to remand the case to the circuit court to deal with that question. But when, as in this case, the parties agree to the amendment, the amendment may be made in the appellate court. U. S. R. S., §§ 954, 1005; Fletcher v. Peck, 6 Cranch, 87, 127; Kennedy v. Bank, 8 How. 586, 611; Gates v. Goodloe, 101 U. S. 612; Bowden v. Johnson, 107 U. S. 251; s. c., 2 S. Ct. Rep. 246." Per Justice Gray in United States v. Hopewell (C. C. A.), 51 Fed. Rep. 798, 800.

<sup>1</sup> U. S. R. S., §§ 1000, 1012.

<sup>2</sup> Anson v. Blue Ridge R. Co., 28 How. 1; Fuller v. Montague (C. C. A.), 53 Fed. Rep. 206; Brobst v. Brobst, 2 Wall. 96; Bigler v. WaHer, 12 Wall.

142; Dodge v. Knowles, 114 U. S. 436; Seward v. Comeau, 102 U. S. 161; Martin v. Hunter, 1 Wheat. 304; Edmonson v. Bloomshire, 7 Wall. 806, 811; Seymour v. Freer, 5 Wall. 822; Davidson v. Lanier, 4 Wall. 447; Evans v. State Bank, 184 U. S. 830.

<sup>3</sup> Stewart v. Masterson, 124 U. S. 493; Brown v. McConnell, 124 U. S. 489.

<sup>4</sup> Shepherd v. Pepper, 133 U. S. 626.

<sup>5</sup> Brockett v. Brockett, 2 How. 238. Where only one of several appellants executes the proper appeal bond, the objection should be taken by way of preliminary motion to dismiss the appeal for irregularity and not on the hearing. Mandeville v. Riggs, 2 Pet. 482.

though all are not named in it.<sup>1</sup> It does not affect the validity of an appeal bond or the integrity of an appeal that the bond runs to the party against whom a decree for the recovery of money was rendered, and also runs to other parties defendant as obligees, as to whom the suit was dismissed and against whom appellant may seek to obtain a decree on the hearing of the appeal.<sup>2</sup>

**§ 960. The same subject continued — Approval of bond.** The approval of the bond required by the statute referred to in the preceding sections cannot be delegated to the clerk or to a commissioner.<sup>3</sup> But the court is not bound to dismiss an appeal absolutely because of an approval by the clerk; it may make an order of dismissal conditioned upon failure to file a sufficient bond.<sup>4</sup> The judge may approve the bond out of court,<sup>5</sup> and approval may be inferred from the fact of the sureties being sworn to their sufficiency by him.<sup>6</sup>

<sup>1</sup> *Scruggs v. Memphis & C. R. Co.*, 104 U. S. 264. It is no objection to the validity of an appeal bond that one of the sureties therein is the solicitor of the appellant. *Studwell v. Palmer*, 5 Paige, 57. As to the liability of sureties upon successive appeal bonds, see *Chester v. Broderick*, 181 N. Y. 549; *Dodge v. Shannon* (Colo.), 32 Pac. Rep. 62.

<sup>2</sup> *Hill v. Chicago & C. R. Co.*, 129 U. S. 170. But where the only payee in the bond is not an appellee, the appeal will be dismissed. *Davenport v. Fletcher*, 16 How. 142.

<sup>3</sup> *Haskins v. St. Louis & C. Ry. Co.*, 109 U. S. 106; *O'Reilly v. Edrington*, 98 U. S. 724; *National Bank v. Omaha*, 96 U. S. 737. See, also, *Warner v. Texas & C. Ry. Co.* (C. C. A.), 54 Fed. Rep. 920. Where by mistake an appeal bond is not acknowledged before a proper officer, the error may be corrected by a new acknowledgment of the bond filed. But where the object of the appeal is to take advantage of a mere technical error

on the part of the respondent, the court will not allow such a mistake to be corrected. *Ridabock v. Levy*, 8 Paige, 197. The court said:—"This court will not, where the appellant himself has made a slip, relieve him from the consequences thereof for the mere purpose of enabling him to take advantage of a similar slip on the part of his adversary." See, also, *Hawley v. Donnelly*, 8 Paige, 416, as to a "slip."

<sup>4</sup> *Freeman v. Clay* (C. C. A.), 48 Fed. Rep. 849.

<sup>5</sup> *Hudgins v. Kemp*, 18 How. 580.

<sup>6</sup> *Silver v. Ladd*, 6 Wall. 440. Where the affidavits of justification by the sureties in an appeal bond were indorsed upon and filed with the bond and the certificate of approval by the proper officers and show that each of the sureties is worth the requisite sum, etc., it is not necessary that the certificate of approval should itself state all those facts. *Coithe v. Crane*, 1 Barb. Ch. 21.

**§ 961. The same subject continued — Appeals in forma pauperis.**— A recent act of congress provides as follows:—  
 “Any citizen of the United States entitled to commence any suit or action in any court of the United States may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action. In any such suit or action that shall have been brought or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit.”<sup>1</sup> Under this act the following points have been decided by the circuit court of appeals:— The complainant may take his case to the circuit court of appeals upon filing the affidavit required, which, however, does not give co-complainants the benefit of the act. No other person can make the affidavit for him. Where the affidavit under which the suit was instituted was insufficient, but no objection was interposed on that account, and the court below dismissed the bill upon the hearing of a demurrer, a motion to dismiss the appeal will be denied, for there is nothing to dismiss, and the court will grant the petition for appeal and along with it the assignment of errors, upon the timely filing of a proper affidavit or execution of the usual bond for costs.<sup>2</sup>

**§ 962. Return to writ of error or appeal in the federal courts — Transcript.**— A writ of error should be returned to the appellate court on or before the return day thereof, together with an authenticated transcript of the record, an assignment of errors, a prayer for reversal and the original citation to the adverse party, all of which should be annexed thereto.<sup>3</sup> The record must be complete and contain in itself

<sup>1</sup> Act of Congress July 20, 1892, ch. 209, §§ 1, 2 (p. 252, U. S. St. 1891-92).

<sup>2</sup> Fuller v. Montague (C. C. A.), 53 Fed. Rep. 206.

<sup>3</sup> U. S. R. S., § 997; Supreme Court

without references *aliunde* all the papers, exhibits, depositions and other proceedings which are necessary to the hearing.<sup>1</sup> On appeal the clerk of the court below, being the custodian of the record, is to determine, in the absence of agreement of counsel, what evidence shall be included in the transcript, following the note of evidence made under the rule of court.<sup>2</sup>

Rule 35; *Wilson v. Daniel*, 8 Dall. 401. The transcript must be filed at the term next succeeding the taking of the appeal. *Hill v. Chicago*, 129 U. S. 170; *Richardson v. Green*, 180 U. S. 104; *Edmonson v. Bloomshire*, 7 Wall. 306; *Grigsby v. Purcell*, 99 U. S. 505. See *Mussina v. Cavazos*, 6 Wall. 353, 359; *Sturgess v. Harrold*, 18 How. 40. Unless the party is prevented by the fraud of his opponent or by the order of the court or the contumacy of the clerk. *United States v. Gomez*, 8 Wall. 752. See *Fayolle v. Texas &c. Ry. Co.*, 124 U. S. 519. Mere appearance does not amount to a waiver. *Grigsby v. Purcell*, 99 U. S. 505. *Mandamus* will lie to compel the clerk to certify a transcript. *United States v. Booth*, 18 How. 476; *United States v. Gomez*, 8 Wall. 752. Where the certificate has appended to it the seal of the court below and lacks the signature of the clerk, the court may permit the record to be withdrawn and perfected by adding the signature. "The question is not one of jurisdiction, but of practice." *Idaho & Oregon Land &c. Co. v. Bradbury*, 182 U. S. 509, distinguishing *Blitz v. Brown*, 7 Wall. 693. See, also, *Berry v. Green*, 111 U. S. 172. As to sufficiency of authentication, see *Garman v. Dozier*, 100 U. S. 7; *Missouri &c. Ry. Co. v. Dinsmore*, 108 U. S. 30; *Blitz v. Brown*, 7 Wall. 693. As to costs for incorporating irrelevant matter in transcript, see *Union Pac. R. Co. v. Stewart*, 95 U. S. 279. Although the Washington statute requires a tran-

script of the statement of facts to be sent to the Supreme Court, the fact that the original statement is sent up, instead of a transcript, is no ground for dismissing the appeal. *Wilson v. Morrell* (Wash. St.), 32 Pac. Rep. 733. Where the original papers in a suit are lost or destroyed by the prevailing party so that the opposite party is precluded from having a transcript made for his appeal, the appellate court will grant a rule on such prevailing party to show cause why the decree shall not be reversed if the papers are not produced. *Quarles v. Heirne* (Miss.), 12 So. Rep. 145. See *Mussina v. Cavazos*, 6 Wall. 355.

<sup>1</sup>Supreme Court Rule 8; Circuit Court of Appeals Rule 14; *Redfield v. Parks*, 180 U. S. 623; *Pennsylvania Co. v. Jacksonville &c. Ry. Co.* (C. C. A.), 55 Fed. Rep. 131. See *Union Pac. Ry. Co. v. United States*, 116 U. S. 402.

<sup>2</sup>*Blank v. Klein* (C. C. A.), 49 Fed. Rep. 1, declaring, however, that it is not within the discretion of the clerk to diminish the record by leaving out any evidence or to increase it with matter not presented. Where the appellant selected such of the papers and proofs used on the hearing below as he thought were necessary, and had them copied into the transcript, the Supreme Court ordered that he file as part of the record properly authenticated copies of such papers admitted as the appellee deemed necessary or the appeal would be dismissed. *Florida Central R. Co. v. Schutte*, 100 U. S. 644. Where the

A transcript which contains all the parts of a deposition called for by either party is sufficient.<sup>1</sup> Upon an appeal from an order of payment to an intervenor out of the proceeds of a foreclosure sale, the appellate court cannot review the finding of the court below that the claim was embraced in a previous decree establishing priority of liens where such decree is not made a part of the record.<sup>2</sup> If witnesses are examined orally in the circuit court, on the hearing of cases in equity, the testimony presented in that form or its substance must be stated in writing and made part of the record, or it will be entirely disregarded on appeal.<sup>3</sup>

§ 963. *Certiorari* for diminution.—If from inadvertence, or mistake of the court below, or from any other cause, the record transmitted is defective or incorrect, the errors or omissions should be suggested to the court and a *certiorari* moved for, to bring up a correct and true transcript.<sup>4</sup> The motion must be made in writing at the first term of the entry of the case,<sup>5</sup> unless upon special cause shown for delay; and the facts upon which the motion was made must, if not admitted by the other party, be verified by affidavit.<sup>6</sup> A *certiorari* to bring up evidence may be granted although it appears

clerk is requested by one party to an appeal to insert in the transcript what he is requested by the other party to leave out, a direction by the court *a quo* is proper. *Hoe v. Kahler*, 27 Fed. Rep. 145.

<sup>1</sup> *Blank v. Klein* (C. C. A.), 49 Fed. Rep. 1.

<sup>2</sup> *St. Louis &c. Ry. Co. v. Stark* (C. C. A.), 55 Fed. Rep. 758; *St. Louis &c. Ry. Co. v. Graham* (C. C. A.), 56 Fed. Rep. 258.

<sup>3</sup> *Blease v. Garlington*, 92 U. S. 1. See Supreme Court Rule 35; Circuit Court of Appeals Rule 11.

<sup>4</sup> Supreme Court Rule 14; Circuit Court of Appeals Rule 18; *Hudgins v. Kemp*, 18 How. 580; *Blank v. Klein* (C. C. A.), 49 Fed. Rep. 1. If the clerk certifies an imperfect transcript, remedy is by *certiorari* to

supply deficiencies, and not by motion to dismiss. *Missouri &c. Ry. Co. v. Dinsmore*, 108 U. S. 80. Where an appeal is regular on the face of the record, a motion to dismiss on account of an irregular or deficient record relating to the taking of the appeal in the court below is not proper. There should first be a motion to amend by inserting in the transcript certificates of the clerk of the court below or a motion for *certiorari*, so that the irregularity may be disclosed in the record. *Hudgins v. Kemp*, 18 How. 580.

<sup>5</sup> Supreme Court Rule 14; Circuit Court of Appeals Rule 18. See *Bein v. Heath*, 142 U. S. 704.

<sup>6</sup> Supreme Court Rule 14; Circuit Court of Appeals Rule 18.



that the case was disposed of on demurrer to the bill, if the record has not been printed in full, and the parties do not agree as to what it contains.<sup>1</sup> The appellee may bring before the court, by *certiorari*, any necessary parts of the record which the appellant has omitted to bring before it.<sup>2</sup> The clerk may, without further order, send up omitted matter,<sup>3</sup> but cannot thus correct an erroneous statement.<sup>4</sup>

§ 964. Assignment of errors.—On appeals or writs of error to the circuit court of appeals or to the Supreme Court under section 5 of the Evarts Act, the plaintiff in error or appellant must “file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.”<sup>5</sup> The court will not consider errors the assignment

<sup>1</sup> *Missouri &c. Ry. Co. v. Dinsmore*, 108 U. S. 30.

<sup>2</sup> *Hoskins v. Fisher*, 125 U. S. 217.

<sup>3</sup> *Morgan v. Curtenius*, 19 How. 8. See *Bein v. Heath*, 142 U. S. 709; *Woodward v. Brown*, 13 Pet. 1; *Stitt v. Huidekoper*, 17 Wall. 384.

<sup>4</sup> *Hudgins v. Kemp*, 18 How. 530.

<sup>5</sup> Supreme Court Rule 35; Circuit Court of Appeals Rule 11. The rule “is so far not jurisdictional that the court may in a proper case entertain the appeal and notice a plain error not assigned or specified. But we consider the better practice is to require a compliance with the rule in

all cases of appeals in equity as well as writs of error in cases at law.” *McCormick, C. J.*, in *Dufour v. Lang* (C. C. A.), 54 Fed. Rep. 913. “The failure to make an assignment of errors under rule 11 of this court is sufficient ground to refuse to hear counsel, but not perhaps in all cases sufficient to dismiss the appeal.” *Coulliette v. Thomason* (C. C. A.), 50 Fed. Rep. 787. See *Farrar v. Churchill*, 185 U. S. 614. See for a case of “plain error” noticed though not assigned, *Gray v. Havemeyer* (C. C. A.), 58 Fed. Rep. 174, 178.

of which is not made and filed in the court below until after the appeal or writ of error is allowed.<sup>1</sup> An appellant cannot assign for error the ruling of the court in respect to any defense not set up in his plea or answer.<sup>2</sup> Where the assignment of error is based upon an allegation of fact which the record shows to be without foundation, the decree will be affirmed.<sup>3</sup>

§ 965. The same subject continued.—It is not enough for an assignment of error to insist that the chancellor erred in a certain particular, without showing any reason why his action was erroneous.<sup>4</sup> An assignment of error that the court upon the facts should have passed a decree for the petitioner and not for the respondent is insufficient.<sup>5</sup> In Connecticut it was held not necessary that an assignment of error should be sufficient against a critical objection, as it rests in the discretion of the court to take notice of errors even when not assigned; declaring, however, the general rule that errors must be assigned with exactness.<sup>6</sup> Under an assignment of error that the court erred in its conclusions of law on the facts found, a claim that the finding of the court was not completed, and that some of the issues were not passed upon in the finding, cannot be considered.<sup>7</sup>

§ 966. Supersedeas—Federal statutes.—The United States Revised Statutes provide that in any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after

<sup>1</sup> *United States v. Goodrich*, 54 Fed. Rep. 21; *Flaherty v. Union Pac. Ry. Co.*, 56 Fed. Rep. 908.

<sup>2</sup> *Bates v. Coe*, 98 U. S. 81.

<sup>3</sup> *Cheney v. Bacon*, 49 Fed. Rep. 305.

<sup>4</sup> *Wood v. Frazier*, 86 Tenn. 501; *Cheatham v. Pearce* (Tenn.), 15 S. W. Rep. 1080.

<sup>5</sup> *Foot v. Percy*, 40 Conn. 86.

<sup>6</sup> *Sturdevant v. Stanton*, 47 Conn. 580.

<sup>7</sup> *Ashmead v. Reynolds* (Ind.), 88 N.

E. Rep. 768. Where three suits in chancery relating to the same property were consolidated, and thereupon one of the complainants filed an amended and supplemental bill reciting specifically and in detail all the proceedings in the three suits, reasserting the prayer for relief as in his original bill, he may, on appeal by one of the other complainants, assign for grounds of error any decree or refusal of decree to his prejudice.

the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a *supersedeas*, executions shall not issue until the expiration of ten days.<sup>1</sup> "A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with."<sup>2</sup> A justice of the Supreme Court cannot allow a *supersedeas* in cases where an appeal was not taken within sixty days, exclusive of Sundays, after the rendition of the decree complained of.<sup>3</sup> Where the appeal is intended to operate as a *supersedeas*, the security given in the appeal bond must be equal to the amount of the decree, and it is not a matter over which the court can exercise a discretion.<sup>4</sup> The power of a justice of the court below over the appeal to the Supreme Court and over the security, in the absence of fraud, is exhausted when he takes the security and signs the citation. From that time the control of the *supersedeas*, as well as the appeal, is transferred to the Supreme Court.<sup>5</sup> The Supreme Court denied a motion for a *supersedeas* to an entire decree,

<sup>1</sup> U. S. R. S., § 1007.

<sup>4</sup> *Stafford v. Union Bank &c.*, 16 How. 135.

<sup>2</sup> *Sage v. Central R. Co.*, 98 U. S. 412; *French v. Shoemaker*, 12 Wall. 100; *Bound v. South Carolina Ry. Co.*, 55 Fed. Rep. 186, 188. "The court can no more give effect to a *supersedeas* by ordering that the appeal shall relate back to a time within the sixty days, than it can to an appeal taken after the expiration of two years, by dating it back to a time within the limitation. To make a *nunc pro tunc* order effectual for such purposes, it must appear that the delay was the act of the court and not of the parties, and that injustice will not be done." *Sage v. Central R. Co.*, 98 U. S. 412.

<sup>5</sup> *Draper v. Davis*, 102 U. S. 121. See, also, *Peugh v. Davis*, 101 U. S. 227. Authority to issue a *supersedeas* does not exist in the Supreme Court except in cases where it is necessary to the exercise of its appellate jurisdiction. *French v. Shoemaker*, 12 Wall. 86. Where a decree of strict foreclosure was affirmed on appeal, and the time limited for redemption expired pending the appeal, the Supreme Court, in consideration of the *supersedeas* of the appeal bond, ordered an extension of time. *Flagg v. Walker*, 113 U. S. 659.

<sup>3</sup> *Kitchen v. Randolph*, 93 U. S. 86.

where the *supersedeas* granted by the circuit court was only to a part thereof, and the circuit justice had power under the statute to grant, in his discretion, a further stay of execution.<sup>1</sup> Where a decree appealed from finds as a fact that land conveyed to another was for the joint benefit of himself and the appellants, a writ of *supersedeas* may issue to stay a writ of assistance issued by the court below, to put the appellee into possession, although the holder of the legal title has not appealed.<sup>2</sup> The Supreme Court will vacate a *supersedeas* when it appears that the bond is practically fictitious and its approval obtained by gross fraud and perjury.<sup>3</sup> Where a *supersedeas* was vacated by the Supreme Court because of a fraudulent bond, the agents of the appellant being cognizant of the fraud, and the appellant not free from suspicion, a new bond was refused.<sup>4</sup> If conditions not contained in the statute are superadded to an appeal bond they will be rejected, and the bond will be construed as having its ordinary and proper legal effect.<sup>5</sup> The condition of a bond on appeal that the appellants "shall duly prosecute their said appeal with effect, and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed in the Supreme Court," covers fully all the requirements of the statute.<sup>6</sup> In an equity cause the property in litigation may be sold by order of the circuit court, and the proceeds invested in stocks, notwithstanding the pendency of an appeal.<sup>7</sup> If, after an appeal, the court below is proceeding to execute its judgment or decree, notwithstanding the *supersedeas*, the Supreme Court may issue an appropriate writ to restrain such action.<sup>8</sup>

§ 967. Sufficiency of bond — Additional security.— The justice who takes the security on appeal is the sole and exclusive judge of what it should be, and his decision is final, unless he violates a statute or rule of practice, and cannot be

<sup>1</sup> Covington &c. Co. v. Keith, 131 U. S. 248.

<sup>2</sup> Hunt v. Oliver, 109 U. S. 177.

<sup>3</sup> Florida Central R. Co. v. Schultz, 100 U. S. 644.

<sup>4</sup> Florida Central R. Co. v. Schultz, 100 U. S. 644.

<sup>5</sup> Hotel Co. v. Kountz, 107 U. S. 378.

<sup>6</sup> Gay v. Parpart, 101 U. S. 391.

<sup>7</sup> Spring v. South Carolina Ins. Co., 6 Wheat. 519.

<sup>8</sup> Goddard v. Ordway, 94 U. S. 672.

controlled by the Supreme Court.<sup>1</sup> If, after security has been accepted, the circumstances have changed, so that security which, at the time it was taken, was "good and sufficient," does not continue to be so, the Supreme Court may, upon a proper application, so adjudge and order as justice may require.<sup>2</sup> A motion for additional security on a *supersedeas* bond will be denied where no personal decree for money can be given, and the circumstances of the parties have not changed since the security was taken.<sup>3</sup>

§ 968. **Damages on supersedeas bonds.**— A *supersedeas* bond conditioned according to the federal statute for prosecuting an appeal with effect and answering all damages and costs covers not merely compensation for the delay arising from the appeal, but also the amount of the decree appealed from, so far as the latter directs the payment of money by the appellant to the appellee.<sup>4</sup> Where the judgment of a federal court in Alabama was affirmed by the Supreme Court, and the condition of the *supersedeas* bond was thereby broken, it was held that judgment might be had thereon by motion against the sureties as well as the principal.<sup>5</sup> Neither the principals nor the sureties can be mulcted beyond what the courts have adjudged as the result of the appeal to which the bond was incidental.<sup>6</sup>

§ 969. **The same subject continued — In foreclosure suits.** An appeal bond in an ordinary foreclosure suit in the courts of the United States does not operate as security for the amount of the original decree; nor for the interest accruing thereon pending the appeal; nor for the balance due after ap-

<sup>1</sup>Jerome v. McCarter, 21 Wall. 17. that the sufficiency of the bond had been impaired.

<sup>2</sup>Jerome v. McCarter, 21 Wall. 17; Williams v. Claflin, 108 U. S. 758. In Harwood v. Dickerhoff, 117 U. S. 200, a motion for an increase of *supersedeas* bond, by reason of the death of one of the appellants and an alleged depreciation of the property for want of care by the survivors, was overruled on the authority of Jerome v. McCarter, 21 Wall. 17, the court not being satisfied

<sup>3</sup>Johnson v. Waters, 108 U. S. 4.

<sup>4</sup>Rosenstein v. Tarr, 51 Fed. Rep. 868, 870; s. c. on appeal, Tarr v. Rosenstein (C. C. A.), 58 Fed. Rep. 112; Supreme Court Rule 29.

<sup>5</sup>Third Nat. Bank v. Gordon, 58 Fed. Rep. 471.

<sup>6</sup>Rosenstein v. Tarr, 51 Fed. Rep. 868, 870.

plying the proceeds of the mortgaged premises; nor for the rents and profits, or use and detention, of the property pending the appeal; but only for the costs of the appeal, and the deterioration or waste of the property, and perhaps burdens accruing upon it by non-payment of taxes. It is very doubtful whether mere depreciation in market value is any cause of recovery on the bond.<sup>1</sup>

§ 970. Dismissal of appeals in the federal courts.—Motions to dismiss will not be considered before the record is printed when there is any question about the facts on which the motion rests.<sup>2</sup> As a general rule oral argument is not allowed on motions to dismiss appeals or writs of error.<sup>3</sup> Although the notice of a motion to dismiss is insufficient because it is not accompanied by a copy of the brief or argument to be used in its support, the filing of a brief on the merits by the appellant is a waiver of the notice required by the rule.<sup>4</sup> After one motion to dismiss has been filed and set down for hearing the appellee has no right to file a second motion to dismiss without leave of the court; and such leave should not be granted upon formal grounds only.<sup>5</sup> The Supreme Court will not dismiss an appeal on motion of one of several appellants against the opposition of the others.<sup>6</sup> A motion by the appel-

<sup>1</sup>Hotel Co. v. Kountze, 107 U. S. 378.

<sup>2</sup>St. Louis Nat. Bank v. United States Ins. Co., 100 U. S. 43. The Supreme Court will not refuse to hear a motion to dismiss before the term in which, in regular order, the record ought to be returned if the record was actually brought up and printed. Thomas v. Wooldridge, 23 Wall. 288. Upon a motion to dismiss as well as on the hearing on the merits, no evidence *dehors* the record as certified and returned by the clerk of the circuit court can be received to impeach its verity or to show that the certificate ought not to have been given. Certificates of such clerk outside of the record, and given since it was certified and transmitted, are inadmissible for that purpose.

Hudgins v. Kemp, 18 How. 580.

Where the record suggests many points connected with the real merits, and in respect to proper pleadings in equity, which cannot be considered upon motion to dismiss, the court will refuse the motion, but will allow it to be brought to the notice of the court again when the case shall be argued upon its merits. Day v. Washburn, 28 How. 309.

<sup>3</sup>Carey v. Houston & Co. Ry. Co. (U. S., 1893), 14 S. Ct. Rep. 63.

<sup>4</sup>Thomas v. Wooldridge, 23 Wall. 288.

<sup>5</sup>Nashua & Co. Corp. v. Boston & Co. Corp. (C. C. A.), 51 Fed. Rep. 929, 931.

<sup>6</sup>Marsh v. Nichols & Co., 120 U. S. 595. After suit instituted by a receiver, a new one was appointed in his place, who took an appeal in the

lee to dismiss an appeal pursuant to a compromise and stipulation with the appellant, a city, was denied provisionally, where a municipal board, claiming authority over the matter, resisted the motion and contested the validity of the compromise.<sup>1</sup> A motion for leave to intervene and have an appeal dismissed, made by general creditors of a mortgagor in a suit by third parties for foreclosure, will be denied.<sup>2</sup> The objection that all the parties defendant in the lower court are not parties to a motion to dismiss is not good where the motion is made by the appellees and is signed by the attorney of the only defendant in the court below who had any real interest in the litigation, and the only one who filed an answer.<sup>3</sup>

§ 971. **The same subject continued.**— When the court cannot pass upon a motion to dismiss an appeal without referring to the transcript on file, it will deny the motion without prejudice.<sup>4</sup> If the appeal is wholly insufficient to sustain the

name of his predecessor from the decree subsequently rendered, and became a surety in the appeal bond. In the Supreme Court the new receiver moved to be substituted as plaintiff and appellant without prejudice to the proceedings already had, and the appellees moved to dismiss the appeal on the ground that none was ever lawfully taken. The first motion was granted and the second motion was denied. *Adams v. Johnson*, 107 U. S. 251. When the United States retires from the prosecution of a suit instituted to vacate a patent of public land without causing the appeal to be dismissed, and another party claiming the same land under another patent is in court to prosecute the appeal, the Supreme Court will not dismiss it on the motion of the appellee as of right, but will look into the case, and if the circumstances require it will hear argument on the case and decide it. *United States v. Marshall & Co.*, 129 U. S. 579.

<sup>1</sup> *New Orleans v. New Orleans & Co.*

*R. Co.*, 108 U. S. 15. If by prosecuting an appeal a board of directors of a corporation violate any trust committed to their hands, or any agreement which is binding upon the corporation and the stockholders, the remedy of the minority or of the third party is not by application to have the appeal dismissed, the appellants objecting, but by proper proceedings in some court of original jurisdiction. *Denver & C. R. Co. v. Alling*, 99 U. S. 463.

<sup>2</sup> *Bronson v. La Crosse & Co. R. Co.*, 2 Black, 524. Upon a motion to intervene and to dismiss an appeal on the ground that the original parties had made a settlement and that the suit was now fictitious, and the facts to support the motion being disputed, the court granted a rule to show cause with leave to both parties to take depositions *pro* and *con*. *American Wood Paper Co. v. Heft*, 8 Wall. 329.

<sup>3</sup> *Thomas v. Wooldridge*, 23 Wall. 283.

<sup>4</sup> *Callan v. Bransford*, 139 U. S. 197.

jurisdiction of the appellate court, the latter may of its own motion take notice of the insufficiency at the hearing on the merits.<sup>1</sup> That the circuit court had no jurisdiction is no ground for dismissing an appeal for want of jurisdiction in the appellate court; the proper remedy is a reversal of the judgment.<sup>2</sup> A cross-appeal will not be dismissed for want of jurisdictional amount in the decree from which it is taken, if the court has jurisdiction of the main appeal opening the whole controversy.<sup>3</sup> It is not proper on a motion to dismiss an appeal to decide what questions may be involved on the hearing of the appeal. These questions can only be considered when that appeal shall come up for hearing on its merits.<sup>4</sup> Where the complainants own both sides of the litigation and control them, the litigation is no longer a real one and the appeal will be dismissed.<sup>5</sup> A motion to dismiss an appeal on the ground that the real parties in the case were not made parties to the appeal was overruled where it appeared by the record to be a mere clerical omission of the clerk.<sup>6</sup> Where the delay in perfecting an appeal was occasioned by the fault of the clerk in not entering the prayer for appeal, a motion to dismiss was denied.<sup>7</sup> Where, pending an appeal, the cause of action was extinguished by an adjudication of another court, the appeal was dismissed without costs to either party.<sup>8</sup> If an appellee does not avail himself of his right under rule 9 of the Su-

<sup>1</sup> *Nashua &c. Corp. v. Boston &c. Corp.* (C. C. A.), 51 Fed. Rep. 929, 931.

<sup>2</sup> *Nashua &c. Corp. v. Boston &c. Corp.* (C. C. A.), 51 Fed. Rep. 929; *Canter v. Insurance Co.*, 2 Pet. 554; *Assessors v. Osbornes*, 9 Wall. 567, 575; *Railway Co. v. Swan*, 111 U. S. 379; *Whittemore v. Bank*, 184 U. S. 527.

<sup>3</sup> *Welsh v. Mayer*, 111 U. S. 81.

<sup>4</sup> *Hill v. Chicago &c. R. Co.*, 129 U. S. 170.

<sup>5</sup> *American Wood Paper Co. v. Heft*, 8 Wall. 333.

<sup>6</sup> *Adams v. Law*, 16 How. 144.

<sup>7</sup> *United States v. Vigil*, 10 Wall. 428. Where appeals were taken from several decrees of different dates, and the clerk, believing, under the

circumstances, that all the appeals made but one case, prepared and filed a transcript in time to perfect only the last appeal, it was held to make no valid excuse for the laches, and the appeals not perfected were dismissed. *Richardson v. Green*, 130 U. S. 104. Where an appeal has been dismissed pursuant to rule 15, section 1, the decree of dismissal may, on cause shown, be received upon the proper representatives of the deceased party being made parties to the suit, and their appearance being entered under the rule. *Randolph v. Quidnick Co.*, 131 U. S. 444.

<sup>8</sup> *Washington Market Co. v. District of Columbia*, 137 U. S. 62.



preme Court to docket and dismiss an appeal for neglect of the appellant to docket the case and file the record as required by the rules, the appellant may file the record at any time during the return term.<sup>1</sup> Cross-appeals must be prosecuted like other appeals; and if not prosecuted until long after the time when by law they should be, they will be dismissed for want of prosecution.<sup>2</sup> Where a cross-appeal has been dismissed for want of prosecution, the appellant therein can be heard only in support of the decree.<sup>3</sup> A motion will not be granted to reinstate an appeal which has been dismissed for defaults growing out of the neglect of counsel or parties except for very good cause.<sup>4</sup> Where the notice of the motion to dismiss an appeal was insufficient and irregular, as it designated no time for the hearing, the cause was reinstated.<sup>5</sup> Where the appellant fails to give a bond to the clerk for the payment of his fees as required by the rule, and the appeal is dismissed for that reason, the court will not allow the appeal to be reinstated at a subsequent term.<sup>6</sup> Where an appeal was dismissed on motion of appellant's counsel, long acquiescence by silence of the appellant will prevent its being reinstated, although he swears that his counsel in consenting to the dismissal acted without his knowledge and consent.<sup>7</sup>

§ 972. Burden of proving error.—“An appellate court sits not to do original justice between the parties, but to determine whether the court below committed manifest and injurious error in its decree. The decree is presumed to be

<sup>1</sup> *Evans v. State Bank*, 134 U. S. 330. If by neglect to pay the clerk fees printed copies of the record are not furnished to the justices or the parties when required in the due prosecution of the cause, the appeal will be dismissed for want of prosecution, unless sufficient cause be shown to the contrary. *Steever v. Ruckman*, 109 U. S. 74. See *Bean v. Patterson*, 110 U. S. 401.

<sup>2</sup> *Hilton v. Dickinson*, 108 U. S. 165.

<sup>3</sup> *Canter v. Insurance Co.*, 3 Pet. 318; *Chittenden v. Brewster*, 2 Wall. 196; *The Stephen Morgan*, 94 U. S. 599;

*Loudon v. Taxing District*, 104 U. S. 771.

<sup>4</sup> *James v. McCormack*, 105 U. S. 265.

<sup>5</sup> *Glenny v. Langdon*, 94 U. S. 605.

<sup>6</sup> *Selma &c. R. Co. v. Louisiana Nat. Bank*, 94 U. S. 253. Where an appeal has been dismissed by consent of the appellant, an order of the court reinstating such appeal will not be made for the exclusive benefit of parties who did not join in the appeal. *Boyd v. Vanderkemp*, 1 Barb. Ch. 373.

<sup>7</sup> *Deming v. United States*, 10 Wall. 251.

according to the law and the truth of the case until the contrary is made clearly to appear."<sup>1</sup> Upon appeal from the dismissal of a bill, if the ground of dismissal is not mentioned it is for the complainant to make it appear that the decree was wrong and that neither ground of defense was valid.<sup>2</sup>

**§ 973. Review of findings of fact.**— Findings of fact in an equity case will not be set aside on appeal unless clearly in conflict with the weight of the evidence upon which they were made.<sup>3</sup>

**§ 974. Objections on appeal.**— The general rule with some exceptions is well settled by numerous decisions that objections will not be considered by an appellate court in reviewing a case unless they were presented and insisted on in the court below as shown by the record.<sup>4</sup> The defendant to an attach-

<sup>1</sup> Dick, D. J., in *Leicester Piano Co. v. Front Royal & Co. Imp. Co.*, 55 Fed. Rep. 190, 196. In Iowa, in an equity case appealed to the Supreme Court and triable *de novo* there, the burden is on the plaintiff, although defendant is the appellant. *Devore v. Adams*, 68 Iowa, 385.

<sup>2</sup> *Donovan v. McCarty*, 155 Mass. 543.

<sup>3</sup> *Metropolitan Nat. Bank v. Rogers*, 58 Fed. Rep. 776; *Kimberly v. Arms*, 129 U. S. 525; *Camden v. Stuart*, 144 U. S. 105; *Crawford v. Neal*, 144 U. S. 585; *Tilghman v. Proctor*, 125 U. S. 187; *Callaghan v. Myers*, 128 U. S. 619; *Furrier v. Ferris*, 145 U. S. 132; *Logue's Appeal*, 104 Pa. St. 141; *Mankel v. Belscamper* (Wis.), 54 N. W. Rep. 500; *Boyle v. Edwards*, 114 Mass. 372; *Francis v. Daley*, 150 Mass. 381. See, also, *Dravo v. Fabel*, 132 U. S. 490; *Harrell v. Beall*, 17 Wall. 590; *Bacon v. Abbott*, 137 Mass. 397; *Montgomery v. Pickering*, 116 Mass. 237; *Boston Music Hall v. Cory*, 129 Mass. 435; *Hewitt v. Campbell*, 109 U. S. 108. Where two courts

below concur in finding the facts, the Supreme Court will not review their decision on conflicting testimony. *Horbach v. Potter*, 8 Wall. 265. "Appellate courts are generally not disposed to disturb the findings of lower courts in the matter of compensation for services of trustees, solicitors, receivers and masters rendered in the conduct of litigation in said courts, whether based on findings of masters or verdicts of juries, unless injustice clearly appears, for the reason that the court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have." *Whitney v. City of New Orleans*, 54 Fed. Rep. 614, 617. See, also, *Trustees v. Greenough*, 105 U. S. 527, 537; *Cowdrey v. Railroad Co.*, 1 Woods, 341; *Head v. Hargrave*, 105 U. S. 45; *Dexter v. Codman*, 148 Mass. 421.

<sup>4</sup> *Leicester Piano Co. v. Front Royal & Co. Imp. Co.* (U. S. App.), 55 Fed. Rep. 190; *O'Reilly v. Campbell*, 116 U. S. 418; *Prothers v. Reynolds* (Ind.), 83

ment in chancery pleaded the statute of limitations without answering to the bill, and it was held that, if the objection to his plea was a valid one, it should have been taken at the time of his offering it and before the issue was joined. It was too late to urge it on appeal.<sup>1</sup> An objection that the finding by the court was not more complete, or that some of the issues were not passed upon in the finding, cannot be raised on appeal for the first time.<sup>2</sup> Where, in an action on a written contract, defendants allege a mistake in reducing the same to writing, but do not pray a reformation, the defect is waived, if not raised until after trial.<sup>3</sup> If the defense of prior invention in a suit for infringement of a patent is not sufficiently explicit, but no objection is offered to the admission of evidence in support of it, it will be considered a waiver on appeal.<sup>4</sup> Where complainant surrendered his patent pending a suit for infringement, and set up a re-issue by supplemental bill instead of proceeding anew, the irregularity was waived by failure to object in the court below.<sup>5</sup> An objection to variance between pleadings and proof must be raised when the evidence is offered and not for the first time on appeal.<sup>6</sup> A bill

N. E. Rep. 763. See, also, Index, tit. **APPEALS**. "It is a general rule of practice that no point arising on the pleadings or evidence in an appellate court shall be made which was not brought to the notice of the inferior court." *Brockett v. Brockett*, 8 How. 692. But see the language of the court in *Watts v. Waddle*, 6 Pet. 389, 402, and *Woodward v. Bullock*, 27 N. J. Eq. 507, 509. Where a case was heard by a vice-chancellor without any reference of the cause to him, and the chancellor adopted his advice and signed the decree, although the proceeding was conceded to be irregular, it was held too late to raise on appeal the question as to the vice-chancellor's right to hear the case. *Delaware Bay &c. Co. v. Markley*, 45 N. J. Eq. 139. When an appellant seeks to reverse a decree because too large an allowance was made to the appellees out of a fund in which he

and they were both interested, he will not be permitted to do so when he has received allowances of the same kind, and has otherwise waived his right to make the specific objection which he raises for the first time in the Supreme Court. *Terry v. Merchants' & Planters' Bank*, 93 U. S. 38.

<sup>1</sup> *Wilson v. Koontz*, 7 Cranch, 202.

<sup>2</sup> *Prothers v. Reynolds (Ind.)*, 33 N. E. Rep. 763.

<sup>3</sup> *Born v. Schrenkeisen*, 110 N. Y. 55; s. c., 17 N. E. Rep. 339.

<sup>4</sup> *Webster Loom Co. v. Higgins*, 105 U. S. 580.

<sup>5</sup> *Reedy v. Scott*, 23 Wall. 352.

<sup>6</sup> *Kimbrough v. Ragsdale (Miss.)*, 13 So. Rep. 390. In Massachusetts all questions of variance between the pleadings and evidence are waived by submitting the case to the full court upon an agreed statement of facts. *Hawes v. Anglo-Saxon &c. Co.*, 101 Mass. 385, 397. A question as to which

for foreclosure of a railroad mortgage alleged that the bonds were payable in gold coin, but the bonds, a copy of one of which was annexed to the bill as an exhibit, were payable in lawful money. The objection of variance was disregarded on appeal.<sup>1</sup> The parties who consented to the appointment of a receiver in the court below cannot assign it for error on appeal.<sup>2</sup> When an issue is directed by a court of chancery to be tried by a court of law, and in the course of the trial at law questions are raised and bills of exceptions taken, these questions must be brought to the notice and decision of the court of chancery which sends the issue; otherwise they cannot be taken in the appellate court.<sup>3</sup> Where no exceptions were filed to a master's report, his finding is as conclusive on appeal as it was in the court below.<sup>4</sup> The cross-examination of a witness by the opposite party is considered as a waiver of exceptions to the regularity of his deposition.<sup>5</sup> "The rule is universal that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal unless it be of such a character that it could not have been obviated at the trial."<sup>6</sup>

**§ 975. The same subject continued.—** Mere formal defects in the proceedings, such as the omission to file a replication to

no allegation is made in the bill and which is not raised at the hearing is not open on a report of the case to the full court. *Nowell v. Boston Academy &c.*, 130 Mass. 209.

<sup>1</sup> *Wallace v. Loomis*, 97 U. S. 146, where the court said:—"If the objection were a valid one, it might have been set up by way of demurrer, or it might have been made in the answer. But in neither of these ways did the appellant see fit to bring it to the notice of the court. We think that he cannot now complain of it as error in the decree."

<sup>2</sup> *Little Rock &c. Co. v. Barrett*, 103 U. S. 516.

<sup>3</sup> *Brockett v. Brockett*, 3 How. 691.

<sup>4</sup> *South Fork Canal Co v. Gordon*.

6 Wall. 561; *Hudgins v. Kemp*, 20 How. 45; s. c., 20 How. 54; *McMicken v. Perin*, 18 How. 507; *Kinsman v. Parkhurst*, 18 How. 289; *Burns v. Rosenstein*, 135 U. S. 450. A decree making an allowance of interest in accordance with a finding of a master, to which no exception was taken, cannot be revised on an appeal to the full court. *Popple v. Day*, 123 Mass. 520.

<sup>5</sup> *Mechanics' Bank v. Seton*, 1 Pet. 299.

<sup>6</sup> *Noonan v. Caledonia &c. Co.*, 122 U. S. 317, citing *United States v. Masters*, 4 Wall. 680; *Burton v. Driggs*, 20 Wall. 125; *Wood v. Weimar*, 104 U. S. 795.

an answer,<sup>1</sup> or a demurrer or a replication to a plea,<sup>2</sup> if not objected to in the court below cannot be assigned for error on appeal. It is not sufficient ground to reverse a decree that on overruling defendant's demurrer to the bill no leave to answer was given, where no application was made for time to answer and no harm resulted to the defendant.<sup>3</sup> An omission to state the name of a defendant in the introductory part of the bill, made, under the equity rule of court in Florida, ground of special demurrer, cannot be urged for the first time in the appellate court.<sup>4</sup> A decree will not be reversed for an immaterial departure from technical rules when it can be seen that no harm resulted to the appellant.<sup>5</sup> The appellate court may in its discretion, if it cannot make a decree which will finally and properly dispose of the subject-matter of the controversy in the absence of a party, dismiss the bill or remit the cause for the purpose of bringing him in. In such cases the objection is available on appeal, though not raised by demurrer or answer.<sup>6</sup>

**§ 976. Objection of adequate remedy at law.**—In the States where the distinction between law and equity is still maintained, the prevailing rule is that an objection on the ground of adequate remedy at law will not be sustained by the appellate court, unless it was made and insisted on in the court below;<sup>7</sup> and in the courts of the United States the ob-

<sup>1</sup> *Pierce v. Brown*, 7 Wall. 205; *Allis v. Northwestern Mut. L. Ins. Co.*, 97 U. S. 144.  
<sup>2</sup> *Fretz v. Stover*, 22 Wall. 198; *National Bank v. Life Ins. Co.*, 104 U. S. 54.

<sup>3</sup> *Nauvoo v. Ritter*, 97 U. S. 389.

<sup>4</sup> *Rice v. Edwards*, 101 U. S. 187.

<sup>5</sup> *McCoy v. Boley*, 21 Fla. 808.

<sup>6</sup> *Allis v. Northwestern Mut. L. Ins. Co.*, 97 U. S. 144; *Rice v. Edwards*, 101 U. S. 187; *Phillips v. Ordway*, 101 U. S. 745. The court refused to reverse a decree for want of notice to the appellant of the time of the sitting of the master, or of the filing of his report, where it appeared that the reference was wholly unnecessary, and appellant suffered no harm.

<sup>7</sup> § 78, *supra*; *Moulton v. Cornish* (N. Y.), 83 N. E. Rep. 843; *Bear v. Telegraph Co.*, 86 Hun. 400.

<sup>8</sup> *Moss v. Adams*, 82 Ark. 562; *Long v. Vallean* (Iowa), 55 N. W. Rep. 31; *May v. Goodwin*, 27 Ga. 352; *Stout v. Cook*, 41 Ill. 447; *Crocker v. Dillon*, 183 Mass. 91; *Russell v. Loring*, 8 Allen, 121, 125; *Blair v. Railroad Co.*, 89 Mo. 883; *Iron Co. v. Trotter*, 43 N. J. Eq. 185, 204; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339, 369. See §§ 18, 14, *supra*.

jection, when made for the first time in the appellate court, is looked upon with extreme disfavor.<sup>1</sup>

§ 977. **Scope of appeal — Decisions on appeal.**— An appeal from a final decree brings before the appellate court all interlocutory orders and decrees involving the merits and prejudicial to the appellant,<sup>2</sup> including a prior decree from which an appeal was taken, but afterwards dismissed for failure to docket,<sup>3</sup> unless such prior decree was in its nature final and appealable.<sup>4</sup> Where an appeal asked and granted was “of this cause,” the whole proceedings of the court below, including an appealable order previously made, are open to consideration.<sup>5</sup> On a bill to foreclose a railroad mortgage, a decree of foreclosure was entered, one clause of which provided that certain kinds of claims, without designating the amounts or the holders thereof, were superior to the mortgage; the decree then provided for a reference to the master to determine the amounts due the several claimants. Subsequently, on a hearing on the master’s report and exceptions, the court entered a decree allowing the claims and amounts as reported,

<sup>1</sup> *Tyler v. Savage*, 143 U. S. 79; s. c., 12 S. Ct. Rep. 840; *Reynes v. Dumont*, 130 U. S. 354, 395; s. c., 9 S. Ct. Rep. 486; *Wylie v. Coxe*, 15 How. 415, 420; *Oelrichs v. Spain*, 15 Wall. 211; *Lewis v. Cocks*, 28 Wall. 466. See, also, *Kilbourn v. Sunderland*, 130 U. S. 305, 514; *Brown v. Iron Co.*, 134 U. S. 530, 535; *Allen v. Car Co.*, 139 U. S. 658, 662; *Preteca v. Maxwell Land Grant Co.* (C. C. A.), 50 Fed. Rep. 574, where it is said that under such circumstances all doubts should be resolved in favor of the jurisdiction.

<sup>2</sup> *Buckingham v. McLean*, 13 How. 150; *Riddle v. Whitehill*, 135 U. S. 621; *Fitzpatrick v. Flannagan*, 106 U. S. 648; *Decker v. Ruckman*, 28 N. J. Eq. 614; *Clair v. Terhune*, 35 N. J. Eq. 336; *Crane v. Decamp*, 23 N. J. Eq. 614; *Terhune v. Colton*, 13 N. J. Eq. 812; *McPherson v. Rockwell*, 37 Wis. 159; *White v. North West*

*Stage Co.*, 5 Oregon, 99; *Frazier v. Tubb*, 2 Heisk. 670. On a mere review of an order reviving a suit and appointing a new party to conduct it on the part of the plaintiff, the Supreme Court will not go back and decide upon the whole question which was passed upon by the circuit court in the original decree. *Terry v. Sharon*, 131 U. S. 40.

<sup>3</sup> *Buckingham v. McLean*, 13 How. 150. And even where the interlocutory orders have been directly appealed from and passed upon by the appellate court. *Price v. Nesbit*, 1 Hill Ch. 445; *Travis v. Waters*, 1 Johns. Ch. 88; s. c. on appeal, 12 Johns. 500; *Shrewsbury R. Co. v. London R. Co.*, 4 De G., M. & G. 115.

<sup>4</sup> *Hill v. Chicago & C. R. Co.*, 140 U. S. 52.

<sup>5</sup> *Central Trust Co. v. Seasingood*, 130 U. S. 482.

and ordering their payment out of the fund in the registry of the court. It was held, on appeal from this decree, that appellant was not precluded from contesting the priority of those claims by his failure to appeal from the first decree, which, though final as to the mortgagor, was interlocutory as to the matters here involved.<sup>1</sup> On appeal from a final decree the appellate court will decide whether a decree of reference, prescribing the limits of an accounting, be right. But items clearly within the limits of the reference, not allowed by the master, where exceptions to the report have not been filed, will not be considered.<sup>2</sup> An order refusing to allow a supplemental answer to be filed does not so enter into a subsequent interlocutory decree deciding the merits that it can be reviewed on appeal from such interlocutory decree.<sup>3</sup> Under a statute providing that "all interlocutory decrees not appealed from shall be subject to revision on appeals from final decrees, so far only as it appears to the full court that such final decrees were erroneously affected thereby," an order sustaining a demurrer is open upon an appeal seasonably taken from a final decree dismissing the bill.<sup>4</sup>

**§ 978. Decisions on appeal continued.**— On an appeal in an equity suit the whole case is before the court, and it is bound to decide it, so far as it is in a condition to be decided.<sup>5</sup> If, for instance, the court below errs in dismissing the bill for want of jurisdiction, the appellate court will examine the merits and affirm the decree when the bill discloses no sufficient equity.<sup>6</sup> Where the circuit court, without jurisdiction in equity to grant the whole of the relief sought, dismissed

<sup>1</sup> *Porter v. Pittsburgh Bessemer Steel Co.*, 120 U. S. 830.

<sup>2</sup> *Clair v. Terhune*, 85 N. J. Eq. 336.

<sup>3</sup> *Butterfield v. Third Avenue Savings Bank*, 25 N. J. Eq. 588.

<sup>4</sup> *Parker v. Flagg*, 127 Mass. 28.

<sup>5</sup> *Ridings v. Johnson*, 128 U. S. 218. In *Massachusetts* the only question upon an appeal from the final decree of a single justice, sitting in equity, without a report of the evidence, is whether the decree was warranted by the allegations and prayer of the

bill. *Soper v. Manning*, 147 Mass. 126; *Stanley v. Stark*, 115 Mass. 259; *Morville v. Fowle*, 144 Mass. 109; *Rankin v. Fitchburg Mut. F. Ins. Co.*, 150 Mass. 55; *Swett v. Thompson*, 149 Mass. 802; *Davis v. Sullivan*, 141 Mass. 76, 78; *Rau v. Von Zedlitz*, 132 Mass. 169; *O'Hare v. Downing*, 130 Mass. 16; *Wilt v. Walker*, 130 Mass. 422; *Iasigi v. Chicago & C. R. Co.*, 129 Mass. 46; *Mason v. Daly*, 117 Mass. 408.

<sup>6</sup> *Ridings v. Johnson*, 128 U. S. 218.

the bill absolutely on its merits, the decree, on appeal, was ordered to be modified so that the dismissal should be without prejudice to complainant's right to proceed at law, and the bill retained for such relief as he might elect and show himself entitled to.<sup>1</sup> Where the diverse citizenship of the parties and the amount involved entitle a party to remove a cause from a State to a federal court, but the subject-matter is not properly cognizable by the circuit court, and jurisdiction is assumed by such court, the Supreme Court, on appeal, will remand the cause to the circuit court with directions to remand it to the State court.<sup>2</sup> Where the decree of the court below was a joint decree against three parties and should have been against one only, the ordinary course is to reverse it as an entirety, and to remand it for a new decree. The court may, however, in its discretion, affirm such a decree in part and reverse it in part, where such a course will not injuriously affect the interest of any of the parties.<sup>3</sup> Where a decree was against a part only of the defendants and costs were awarded against all, and all appealed, and all had an interest in maintaining the defense, the reversal of the decree was made general and the whole case opened.<sup>4</sup> A decree may be affirmed<sup>5</sup> or reversed,<sup>6</sup> pursuant to stipulations of the parties. Where the Supreme Court of the District of Columbia in special term decreed part of the relief prayed for, ignoring the remainder, and afterward, in general term, no appeal having been taken, vacated the decree and dismissed the bill generally, the appellant in the United States Supreme Court is only entitled to relief in regard to the affirmative part of the decree in special term.<sup>7</sup> Where the erroneous part of a decree is distinct from and independent of the other portions of it, the former may be reversed without disturbing the rest.<sup>8</sup> While the Supreme Court will not hesitate to set aside a de-

<sup>1</sup> *Smith v. Bourbon County*, 127 U. S. 118.

<sup>2</sup> *Cates v. Allen*, 18 S. Ct. Rep. 888.

<sup>3</sup> *Elizabeth v. American & Co. Co.*, 97 U. S. 79.

<sup>4</sup> *Findlay v. Hinde*, 1 Pet. 241.

<sup>5</sup> *Andrews v. Cone*, 124 U. S. 720.

<sup>6</sup> *Bond v. Davenport*, 128 U. S. 619.

<sup>7</sup> *Porter v. White*, 127 U. S. 248.

<sup>8</sup> *Sherwood v. Sherwood*, 82 Conn. 2, 15. If a judgment of the superior court be erroneous only in part, and that part be divisible, the judgment should be reversed only as to that part, and the cause remanded, if necessary, for further proceedings according to law. *Donalds v. Plumb*, 8 Conn. 448.



oree collusively obtained, the proof ought to be very clear to induce it to do this at the instance of strangers to the suit, although incidentally affected by the decision of the questions involved.<sup>1</sup>

**§ 979. Decision on appeal in specific performance.**—As specific performance is not a matter of absolute right in either party, an appellate court has not only the power to decide all questions of law and fact presented by the record, but also whether the court below acted wisely and justly, under the particular circumstances of the case. Such a decree may be reviewed and reversed if it clearly appears from the record to have been rendered in disregard of some well-established principle of law or equity.<sup>2</sup> But “the court must give a certain degree of credit to the decree, supposing it to be right, unless a strong ground is shown for the contrary conclusion, more than the mere dissatisfaction of the party appealing.”<sup>3</sup> “The presumption (on appeal) of the correctness of a decree in a court of original jurisdiction is especially strong and influential in a case where all the evidence is in writing and remains unchanged, and the arguments of counsel are substantially the same, and the judge, after a full and patient hearing, exercises the discretionary jurisdiction of granting or refusing the specific performance of a contract.”<sup>4</sup>

**§ 980. Erroneous rulings on evidence.**—The admission of irrelevant evidence is no ground for reversal on appeal. Such evidence will simply be rejected in the consideration of the case upon the appeal.<sup>5</sup> In the federal courts a rehearing will

<sup>1</sup> *Cochrane v. Deener*, 95 U. S. 355.

<sup>2</sup> *Leicester Piano Co. v. Front Royal &c. Imp. Co.*, 55 Fed. Rep. 190, 196.

<sup>3</sup> *Gwynn v. Lethbridge*, 14 Ves. 585.

<sup>4</sup> *Per Dick, D. J., in Leicester Piano Co. v. Front Royal &c. Imp. Co.*, 55 Fed. Rep. 190, 203.

<sup>5</sup> *Wilson v. Hoes*, 94 U. S. 462; *Kleiman v. Geiselman* (Mo.), 21 S. W. Rep. 796; *Salt Lake F. & M. Co. v. Mammoth Min. Co.* (Utah), 23 Pac. Rep. 760; *Miller v. Houston City St. Ry. Co.*, 56 Fed. Rep. 366, 372. See, also,

*Gordon v. Reynolds*, 114 Ill. 118, 125;

*Sawyer v. Campbell*, 180 Ill. 186; *Giles v. Hodge*, 74 Wis. 360; *Barraque v. Siter*, 9 Ark. 545. Although incompetent evidence be received, yet if the decree can be sustained by such evidence in the record as is competent and relevant, it will not be disturbed on appeal. *Ruckman v. Cory*, 129 U. S. 387, 390. Where evidence is admitted without objection, it is too late on appeal to object that the averments in the bill were not

not be ordered below on account of the exclusion of evidence.<sup>1</sup> The excluded evidence in order to be available on appeal must be inserted in the record so that the appellate court may direct the entry of such a decree by the court below as shall appear to be proper in view of all the legitimate evidence.<sup>2</sup>

**§ 981. Further evidence on appeals.**—Appeals in equity are heard upon the pleadings and proofs below. No new evidence can be admitted.<sup>3</sup> Affidavits presented to the master, or the court below, as grounds of applications to re-open the proofs, cannot be considered by the court on appeal.<sup>4</sup> In Massachusetts on an appeal from a decree of a single justice to the full court, without a report of the evidence, or the facts upon which the decree was made, an application to take evidence comes too late.<sup>5</sup>

**§ 982. Amendment of pleadings in appellate court.**—It is the practice of the United States Supreme Court, where amendments are necessary, to remand the cause to the court below for that purpose.<sup>6</sup> The record cannot be amended in

broad enough to cover it. *Blanchard v. Cooke*, 147 Mass. 215.

<sup>1</sup>*Blease v. Garlington*, 92 U. S. 1. *Contra* in *Washington*. *Scully v. Book*, 3 Wash. St. 182, 187. United States Supreme Court Rule 18 provides that no objection shall be allowed to the admissibility of any deposition, deed, grant or other exhibit, found in the record as evidence, unless objection was taken thereto in the court below and entered of record. See *Paine v. Trask*, 56 Fed. Rep. 235; *Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 298; *Falk v. Gast L. & E. Co.*, 54 Fed. Rep. 890.

<sup>2</sup>*Blease v. Garlington*, 92 U. S. 1. See, also, *Ades v. Mott Iron Works*, 46 Fed. Rep. 39.

<sup>3</sup>*Pacific R. Co. v. Missouri Pac. Ry. Co.*, 95 U. S. 1; *Russell v. Southard*, 12 How. 189; *Holmes v. Trout*, 7 Pet. 171; *Mitchell v. United States*,

9 Pet. 715; *Bloodgood v. Clark*, 4 Paige, 574; *Stdwell v. Palmer*, 5 Paige, 166; *Spurlock v. Fulks*, 1 Swan, 289.

<sup>4</sup>*Thomson v. Wooster*, 114 U. S. 104. Evidence questioning the validity of a patent is inadmissible in proceedings before a master, or on appeal, after a decree has been taken *pro confesso* on a bill for infringement and an account. *Thomson v. Wooster*, *supra*.

<sup>5</sup>*Mason v. Daly*, 117 Mass. 408.

<sup>6</sup>*Kennedy v. Bank of Georgia*, 8 How. 586, where it was said that the only exception to this rule has been where the counsel on both sides have agreed to the amendment; that this has often been done, and it has not been supposed that there was any want of power in the court to permit it; and that section 82 of the Judiciary Act of 1789, allowing amendments, is sufficiently comprehensive

the Supreme Court on appeal by inserting a necessary averment of citizenship, but the case will be remanded to the court below, which may in its discretion allow the amendment,<sup>1</sup> and if allowed there and a rehearing had, it can come before the Supreme Court again by appeal.<sup>2</sup>

§ 983. **Rehearing of appeals—Federal decisions.**—It is the well-established rule that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and the court has invariably refused all applications for rehearing made after an adjournment of the term.<sup>3</sup> The Supreme Court will not grant a rehearing in an equity cause after it has been remitted to the court below to carry into effect the decree according to its mandate,<sup>4</sup> unless the mandate has been recalled.<sup>5</sup> "No rehearing is granted unless some member of the court who concurred in the judgment expresses a desire for it, and not then unless the proposition receives the support of a majority of the court."<sup>6</sup> And in the application of this rule it

to embrace causes of appellate as well as original jurisdiction.

<sup>1</sup> *Johnson v. Christian*, 125 U. S. 642.

<sup>2</sup> *Jackson v. Ashton*, 10 Pet. 480.

<sup>3</sup> *Bronson v. Schulten*, 104 U. S. 410; *Brooks v. Burlington & Co. Ry. Co.*, 102 U. S. 107; *Public Schools v. Walker*, 9 Wall. 603; *Hudson v. Guestier*, 7 Cranch, 1; *Brown v. Aspden*, 14 How. 25, cited in *King v. Ruckman*, 22 N. J. Eq. 551, 554; *United States v. Knight*, 1 Black, 488. See, also, *Williams v. Conger*, 181 U. S. 890. "The argument presupposes that this court in cases in equity has adopted the rules and practice of the English chancery. But this is a mistake. The English chancery is a court of original jurisdiction; and this court is sitting as an appellate tribunal. It would be impossible from the nature and office of the two tribunals to adopt the same rules of practice in both."

*Brown v. Aspden*, 14 How. 26. "A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term." *United States Supreme Court Rule 30*; *Circuit Court of Appeals Rule 29*.

<sup>4</sup> *Browder v. McArthur*, 7 Wheaton, 58; *Washington Bridge Co. v. Stewart*, 3 How. 418; *Peck v. Sanderson*, 18 How. 42; *Sibbald v. United States*, 12 Pet. 488.

<sup>5</sup> *Killian v. Ebbinghaus*, 111 U. S. 798; *Ex parte Crenshaw*, 15 Pet. 119; *United States v. Gomez*, 28 How. 396.

<sup>6</sup> *Ambler v. Whipple*, 28 Wall. 278; *Brown v. Aspden*, 14 How. 25; *City of Shreveport v. Holmes*, 125 U. S. 694; *United States v. Knight*, 1 Black, 488; *Public Schools v. Walker*, 9 Wall. 603; *Supreme Court Rule 30*; *Circuit Court of Appeals Rule 29*.

makes no difference whether the decision was made by a divided court or not.<sup>1</sup>

§ 984. **The same subject continued.**—A rehearing will not be granted in order that a record of another suit, which was not pleaded and was not conclusive, may be embodied in the transcript.<sup>2</sup> A motion for a rehearing after decision in the Supreme Court, and to remand the cause for further proof, accompanied by affidavits of new evidence, was overruled.<sup>3</sup> A petition for rehearing "must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel."<sup>4</sup> It is submitted for consideration without argument in the first instance<sup>5</sup> or reply to the application.<sup>6</sup>

§ 985. **The same subject continued — Massachusetts decisions.**—A petition for a rehearing of a case decided by the full court is addressed exclusively to its discretion, and is not granted nor permitted to be argued unless the court on inspection of the petition so orders.<sup>7</sup> A certificate of counsel,

<sup>1</sup> *Brown v. Aspden*, 14 How. 26.

<sup>2</sup> *Morgan County v. Allen*, 108 U. S. 515. See, also, § 883 *et seq.*, *infra*. On a petition for rehearing, where it appeared that the appellee (petitioner) was at fault, the court nevertheless said:—"If the hearing in this court was had on an imperfect record, and a large part of the material evidence which was before the court below was omitted in the certified transcript, and there was no laches or neglect of the appellee in failing to examine and procure the record to be perfected before the hearing, it presents a strong appeal for re-argument, which the court will consider." *Ambler v. Whipple*, 28 Wall. 278. But where it was alleged that the decree brought up by the appeal was not what it was recited to be in the prayer for appeal, but one merely in execution thereof and not appealable, the Supreme Court, to enable the parties to present whatever questions

arose upon the record as it stood, or upon a complete record when supplied, granted a rehearing and suspended temporarily its former decree. *Chicago, Danville &c. R. Co. v. Fosdick*, 106 U. S. 82.

<sup>3</sup> *Russell v. Southard*, 12 How. 139.

<sup>4</sup> Supreme Court Rule 30; Circuit Court of Appeals Rule 29; *Public Schools v. Walker*, 9 Wall. 608.

<sup>5</sup> *Public Schools v. Walker*, 9 Wall. 608.

<sup>6</sup> *Ambler v. Whipple*, 28 Wall. 278.

<sup>7</sup> *Lincoln v. Eaton*, 132 Mass. 63; *Winchester v. Winchester*, 121 Mass. 127, 130, expressly conforming herein to the practice in the United States Supreme Court. In the case last cited it was said that the practice of the English court of chancery as to rehearings affords no rule to govern a court of last appeal, whose judgments have the strongest presumption in their favor, and cannot be freely reconsidered without unrea-

though not allowed the same weight in the American courts as in the English chancery, should properly be annexed to the petition, and the application should distinctly specify the grounds upon which it rests, and so far as it involves matter of fact should be supported by affidavits.<sup>1</sup>

**§ 986. The same subject continued — New Jersey decisions.**— In New Jersey it is declared that the power to order a re-argument should be “very sparingly exercised, and perhaps in no case unless upon the motion of the court.”<sup>2</sup> A motion for re-argument will not be entertained after the term has ended and the cause has been remitted to the court below.<sup>3</sup>

**§ 987. The same subject continued — Indiana decisions.** It is settled by a long line of cases that a rehearing will not be granted to enable parties to procure a correction of the record.<sup>4</sup> If there are points in the record which are not suggested to or perceived by the court, it will not consider such points on a petition for rehearing.<sup>5</sup>

sonably protracting litigation and disregarding the claims of the other suitors to the attention of the court.

<sup>1</sup> *Winchester v. Winchester*, 121 *Masa.* 127.

<sup>2</sup> *King v. Ruckman*, 22 *N. J. Eq.* 551, 554; *Cassedy v. Bigelow*, 27 *N. J. Eq.* 505.

<sup>3</sup> *King v. Ruckman*, 22 *N. J. Eq.* 551, 553, where the chief justice said:—“After final judgment pronounced and entered, and a sending down of the record, there is no known instance of this court’s again taking cognizance of the case. I have no doubt that this court has the power at any time to amend its judgment, or if it is erroneous by reason of the misentry of the clerk, or by reason of any other mistake; or that such judgment may be set aside and treated as a nullity if it has been procured by fraud, or is the result of misapprehension. But I also think that when such judgment has been rendered after a hearing upon the

merits, and has been entered on the minutes in accordance with the views of the court, and the record has been regularly remitted to the inferior court, this court has no further jurisdiction over the case.”

<sup>4</sup> *Bank of Westfield v. Inman* (Ind.), 34 *N. E. Rep.* 670; *Warner v. Campbell*, 39 *Ind.* 409, where it was said that “it is not the practice in any court to allow a new trial or a rehearing merely that the party may amend his pleadings and present the case in a new form;” *Railway Co. v. Van Houten*, 48 *Ind.* 90; *Cole v. Allen*, 51 *Ind.* 122; *State v. Terre Haute & C. R. Co.*, 64 *Ind.* 297; *Board & C. v. Hall*, 70 *Ind.* 449; *Mansur v. Churchman*, 84 *Ind.* 578; *Robbins v. Magee*, 9 *Ind.* 174; *State v. Dixon*, 97 *Ind.* 125; *Board & C. v. Center T’p.*, 105 *Ind.* 422, 444; *Elliott’s App. Proc.*, § 556.

<sup>5</sup> *Martin v. Martin*, 74 *Ind.* 207. See, also, *Funk v. Reutchler* (Ind.), 33 *N. E. Rep.* 898.

§ 988. The same subject continued — Rule in Tennessee. In Tennessee "petitions to rehear should be filed only to raise some new question of manifest importance not considered in the court's opinion; or to bring to the attention of the court some matter of law or fact which was manifestly overlooked; or to bring forward some other matter in which the decree of the court is manifestly erroneous."<sup>1</sup>

§ 989. Second appeals.— A second appeal on the same questions litigated and determined in the first will be dismissed.<sup>2</sup> An appeal from a decree made in exact compliance with the mandate upon a previous appeal of the same case will be dismissed with costs upon motion of the appellee.<sup>3</sup>

§ 990. The same subject continued.— A party may, after an appeal dismissed for informality, if within the original time to appeal, bring up the case again.<sup>4</sup> So if the court below, in proceeding to execute the mandate of the appellate court, misconstrues it to the injury of either party, an appeal lies to have the error corrected.<sup>5</sup> Second appeals have

<sup>1</sup>Gibson's Suits in Chancery, § 1142; *Andrews v. Crenshaw*, 4 Heisk. 151. See, also, *Hubbard v. Fravell*, 12 Lea, 805; *Bleidorn v. Pilot Mountain &c. Co.*, 5 Pickle, 204; *Senter v. Bowman*, 5 Heisk. 14; *Nicholson v. Patterson*, 2 Humph. 448; *Lindsley v. Thompson*, 1 Tenn. Ch. 272, 275. Petitions must be presented before the last day of the term and within ten days after the opinion is filed, and no re-argument is allowed unless upon notice by the court. Supreme Court Rule 17; *Adams v. Sharon*, 5 Pickle, 835.

<sup>2</sup>*Corning v. Troy Iron Factory*, 15 How. 451. Two appeals are not allowed in the same case on the same question. The court will determine which of the two shall be dismissed. *Wheeler v. Harris*, 18 Wall. 51.

<sup>3</sup>*Mackall v. Richards*, 116 U. S. 45; *Stewart v. Salamon*, 97 U. S. 361; *Clifford, J.*, dissenting, and expressing the opinion that it could not be

dismissed, but should be heard and reversed or affirmed, as the case might be. The ruling in the case was followed in *Humphrey v. Baker*, 108 U. S. 786, where it was held that the court will, on application, examine the decree, and if it conforms to the mandate dismiss the case with costs; and if the decree does not conform, the case may be remanded with proper directions for the correction of the errors. *Railroad Co. v. Anderson*, 149 U. S. 237; *Aspen Min. & Smelting Co. v. Billings* (U. S.), 14 S. Ct. Rep. 4.

<sup>4</sup>*Yeaton v. Lenox*, 8 Pet. 128; *Edmonson v. Bloomshire*, 7 Wall. 306. When the term at which an appeal is returnable goes by without the filing of the record, a second appeal may be taken if the time for appeal has not expired. *Evans v. State Bank*, 184 U. S. 330.

<sup>5</sup>*Perkins v. Fourniquet*, 14 How. 828; *Corning v. Troy Iron Foundry*,

always been allowed to bring up proceedings subsequent to the mandate, and not settled by the terms of the mandate itself.<sup>1</sup> Second appeals bring up for consideration only the proceedings of the court below after the mandate of the appellate court;<sup>2</sup> and the points already decided by the appellate court are not open to debate, unless by the special order of the court.<sup>3</sup> It is too late upon the second appeal to urge that the court had no jurisdiction to try the first appeal.<sup>4</sup> The rule that what was decided on the first appeal is not open to reconsideration in the same case on a second appeal does not apply to expressions of opinion on matters the disposition of which was not required for the decision.<sup>5</sup> It was recently

15 How. 451, 466. Where the Supreme Court affirmed a decree of the court below, and directed further proceedings consistent with right and justice, and the court thereafter made a decree which prejudiced substantial rights of a party not concluded by the original decree, a second appeal was entertained. *Mackall v. Richards*, 112 U. S. 369.

<sup>1</sup> *Hinckley v. Morton*, 108 U. S. 764.

<sup>2</sup> *Supervisors &c. v. Kennicott*, 94 U. S. 498; *Corning v. Troy Iron Factory*, 15 How. 451, 466.

<sup>3</sup> *Cassedy v. Bigelow*, 27 N. J. Eq. 505. "Where a case has been heard in the circuit court, reversed by the Supreme Court, and remanded with instructions as to the decree that shall be entered, a party cannot on a subsequent appeal assign for error any cause that accrued prior to the decision of the Supreme Court. It will be presumed where a case has been determined in the Supreme Court upon its merits and the errors assigned that the appellant or plaintiff in error has no further objections to urge against the record, and that if any errors exist which are not so assigned they are waived; and he will not be permitted to have his case heard partly at one time and the resi-

due at another." *Ogden v. Larrabee*, 70 Ill. 510. The remarks of the court in respect to a like question in *Kingsbury v. Buckner*, 70 Ill. 514, are also pertinent:—"We cannot examine as to the merits of the original case, but only as to the proceedings subsequent to the decision at the former hearing. If the course suggested and so strongly insisted upon by counsel for the appellant was pursued by the appellate courts litigation would never cease. New counsel, as in this case, would make new arguments and present additional points for adjudication, and the result of persistence would finally settle the rights of the parties. The appellate power of this court would then be exercised more over its own proceedings and judgments than over those of inferior courts." To the like effect, see, also, *Newberry v. Blatchford*, 106 Ill. 584; *Briscoe v. Lloyd*, 64 Ill. 28; *Walker v. Doane*, 108 Ill. 236; *Hook v. Richardson*, 115 Ill. 431.

<sup>4</sup> *Washington Bridge Co. v. Stewart*, 8 How. 418, where it was contended that the decree first appealed from was interlocutory only.

<sup>5</sup> *Barney v. Winona &c. R. Co.*, 117 U. S. 228.

held in California that, although a determination of the Supreme Court on a former appeal is conclusive on a second appeal if the record presents the same matters, either of fact or law, such judgment is not final on a second appeal if the record contains matters directly affecting the findings whereon the judgment rests, which were not before the court on the former appeal.<sup>1</sup>

<sup>1</sup> *Klauber v. San Diego Street Car Co.* (Cal., 1898), 82 Pac. Rep. 876, defining the phrase "law of the case" as formulated in that State.



## CHAPTER XXIX.

### MANDATE.

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| <p>§ 991. Issuance and recall.<br/>992. Mandate on reversal in patent cases.<br/>993. Restitution upon reversal.<br/>994. Execution of mandate.<br/>995. The same subject continued.<br/>996. Remedy for formal error in mandate.</p> | <p>§ 997. Proceedings in the court below — Supplemental bill.<br/>998. Construction of mandate — Resort to opinion.<br/>999. Construction of mandate continued.<br/>1000. Allowance of interest.<br/>1001. Damages for delay.</p> |
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§ 991. Issuance and recall.— The federal appellate courts have no power to issue execution on appeal from the decree of an inferior court,<sup>1</sup> but the decree is embodied in a mandate which is sent down to the court below. No mandate issues without an order from the appellate court, which is usually granted only on consent upon notice.<sup>2</sup> It is the practice in the Supreme Court of the United States, when no special circumstances are shown, to issue no mandates except immediately before the February recess, and immediately before the conclusion of the term.<sup>3</sup> Where an order is granted reserving liberty to apply to the court below for leave to file a bill of review, it will form part of the mandate.<sup>4</sup> The Supreme Court may recall its mandate and correct it before,<sup>5</sup> but not upon an application made after,<sup>6</sup> the expiration of the term at which the decree was rendered.<sup>7</sup>

<sup>1</sup> U. S. R. S., § 701; 26 St. at L., ch. 517, §§ 10, 11; *Sibbald v. United States*, 12 Pet. 488.

<sup>2</sup> *Foster's Federal Practice* (2d ed.), § 495. See *Circuit of Appeals Rule 32*.

<sup>3</sup> *Foster's Federal Practice* (2d ed.), § 495.

<sup>4</sup> *Watson v. Stevens*, 58 Fed. Rep. 31, 34.

<sup>5</sup> *Killian v. Ebbinghaus*, 111 U. S. 798, where the mandate from the

Supreme Court to the court below was erroneous as to the title of the cause, and it was recalled, and a new one issued correctly describing the title; *Ex parte Crenshaw*, 15 Pet. 119; *United States v. Gomez*, 23 How. 326.

<sup>6</sup> *Schell v. Dodge*, 107 U. S. 639; *Killian v. Ebbinghaus*, 111 U. S. 798. See, also, *Phipps v. Sedgwick*, 95 U. S. 192.

<sup>7</sup> In *Sibbald v. United States*, 2

§ 992. **Mandate on reversal in patent cases.**—The invariable order of the United States Supreme Court, in reversing a final decree of the circuit court sustaining a bill for infringement of letters patent, is:—“The decree is reversed and the cause remanded, with a direction to dismiss the bill of complaint with costs.”<sup>1</sup>

§ 993. **Restitution upon reversal.**—Where a judgment or decree which is reversed has been executed pending the writ of error or appeal, the mandate should include a direction to the court below to compel restitution.<sup>2</sup> The chancellor has the power to make an order for restitution of money paid on a decree afterwards reversed on appeal, when the parties are before him, and there is shown to have been a decree, payment thereunder, and a reversal thereof.<sup>3</sup>

§ 994. **Execution of mandate.**—The court below can only execute the mandate of the appellate court. It cannot vary in any way the decree of the former, and can only settle what remains to be done.<sup>4</sup> The court below cannot refuse to carry

How. 455, a petition to alter a former mandate was dismissed, the court being of the opinion that it had no power to grant it. See, also, *Washington Bridge Co. v. Stewart*, 8 How. 413. In Massachusetts, if on a bill in equity the full court orders a decree for the plaintiff, without stating the form of the decree, this is to be settled by one justice; and an appeal lies from a decree afterwards entered by him, although it in part purports to recite the judgment of the full court. *Sewall v. Sewall*, 130 Mass. 201.

<sup>1</sup> Recent cases which show this practice are:—*St. Germain v. Brunswick*, 135 U. S. 227, 231; *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 403; *Burt v. Evory*, 133 U. S. 349, 359; *McCormick v. Graham's Adm'r*, 129 U. S. 1, 19; *Brewing Co. v. Gottfried*, 128 U. S. 158, 170.

<sup>2</sup> *Foster's Federal Practice* (2d

ed.), § 495, citing *The Rachel v. United States*, 6 Cranch, 329; *Bank of U. S. v. Bank of Washington*, 6 Pet. 8; *Morris' Cotton*, 8 Wall. 507; *Ex parte Morris*, 9 Wall. 605; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216.

<sup>3</sup> *Ex parte Walter*, 89 Ala. 237; s. c., 7 So. Rep. 400.

<sup>4</sup> *Chaires v. United States*, 3 How. 611; *Green v. Chicago & C. R. Co.*, 49 Fed. Rep. 907, 909; *Kimberly v. Arms*, 40 Fed. Rep. 551, and cases there cited; *In re Washington & C. R. Co.*, 140 U. S. 91, 96; *Quackenbush v. Leonard*, 10 Paige, 131. “On a mandate from this court affirming a decree, the circuit court can only record our order and proceed with the execution of its own decree as affirmed. Our judgment by a divided court is just as much our judgment for the purposes of the case in hand as if it had been unanimous.” *Durant v. Essex County*,

out the mandate of the appellate court on the ground of want of jurisdiction in itself or in the appellate court.<sup>1</sup> Where the Supreme Court affirmed the title to lands in Florida, and referred, in its decree, to a particular survey, it was held not proper for the court below to open the case for a rehearing for the purpose of adopting another survey.<sup>2</sup>

§ 995. *The same subject continued.*—After decree entered, appeal taken and heard, and cause remanded to the court below for a special purpose, it too late to aver in that court that the claim is legally merged in an indivisible cause of action determined in a prior case.<sup>3</sup> It is not error, on the execution of the mandate of the Supreme Court, for the court below to permit a third person to become a party and set up rights not embraced in the former decree, where it is done by consent of all parties.<sup>4</sup> If an absolute dismissal of a bill is affirmed, the court below cannot decree that the dismissal is without prejudice.<sup>5</sup> A State court cannot dismiss a bill on the ground of an adequate remedy at law after the case has been remanded from the United States Supreme Court for final judgment.<sup>6</sup> Where the mandate directing a decree in favor of a party is silent in respect to costs, the court below

101 U. S. 555, 556. See, also, *Ex parte Story*, 12 Pet. 389. The Supreme Court refused to reverse the decree of the court below for immaterial error in proceeding under the mandate. *Campbell v. Pratt*, 2 Pet. 354. Compliance with the mandate may be compelled by *mandamus* or other appropriate writ. *Campbell v. James*, 31 Fed. Rep. 525. A decree entered in conformity with the mandate of an appellate court to which the case has been appealed cannot be attacked by original bill on the ground of errors, apparent on the record, not involving the jurisdiction. *Kingsbury v. Buckner*, 134 U. S. 650. See § 855, *supra*. According to the practice and jurisprudence of the State of Illinois, where the decision of the Supreme Court reversing and remanding a

cause in equity does not involve the merits, the case, upon the filing of the transcript in the court below, stands for rehearing in that court. *King v. Worthington*, 104 U. S. 44.

<sup>1</sup> *Aspen Min. & Smelting Co. v. Billings* (U. S.), 14 S. Ct. Rep. 4, 6; *Skillern's Ex'rs v. May's Ex'rs*, 6 Cranch, 267; *In re Washington & C. R. Co.*, 140 U. S. 91; *Gaines v. Rugg*, 148 U. S. 228, 241; *Whyte v. Gibbs*, 20 How. 541.

<sup>2</sup> *Chaires v. United States*, 8 How. 611.

<sup>3</sup> *New Orleans v. Gaines' Adm'r*, 138 U. S. 597, 614.

<sup>4</sup> *Hawkins v. Blake*, 108 U. S. 422.

<sup>5</sup> *Durant v. Essex County*, 101 U. S. 555.

<sup>6</sup> *Tyler v. Magwire*, 17 Wall. 253.

may properly include therein its own costs, although the bill contained no express prayer for costs.<sup>1</sup>

**§ 996. Remedy for formal error in mandate.**—If a decree of the appellate court be misentered in the minutes it must be executed by the court below as it was entered and not as it was pronounced, the proper remedy being to apply to the appellate court to rectify the entry of the decree.<sup>2</sup>

**§ 997. Proceedings in the court below — Supplemental bill.**—Upon the return of a cause in equity from the appellate court to the court below for further proceedings, the plaintiff may by supplemental bill plead new matter occurring since the final submission of the case in the inferior

<sup>1</sup> *United States v. Southern Pac. R. Co.*, 56 Fed. Rep. 885. See, also, *Riddle v. Mandeville*, 6 Cranch, 86.

<sup>2</sup> *Tuttle v. Gilmore*, 42 N. J. Eq. 369, where Beasley, C. J., said:—"A decree having been pronounced in this court as the result of a former appeal between these parties, that decree was sent to the court of chancery with instructions to execute it. The contention of the appellant now is that the chancellor has not put it into effect, but has introduced into it certain modifications. If we have regard simply to the entry of the decree of this court on its minutes, we think the justness of this criticism is not to be disputed. The judgment of this court, as it stands on our own records, has not been carried into effect according to its plain terms. That this is the case will clearly appear from the statement of the facts as presented in the opinion of the chancellor. But while we think that our decree as recorded has not been complied with, we also think that the chancellor has properly interpreted the intention of this court as expressed in its opinion, reading that opinion in the light of its application

to the facts of the case. . . . It is apparent from this statement that the difficulty has arisen from the judgment of this court having been misentered in the record. The court of chancery has, in point of fact, executed the judgment of this court as it was pronounced, but not as it was entered, and therein we think an error was committed. Like those of all other judicial tribunals, the record of this court kept under its own supervision must be taken as the infallible exponent of its mind, and as in every respect correct; and it is not alterable except under its own authority. The result, therefore, is that the respondent should have been sent to this court to ask that this misentry should be rectified. It was a formal error for the court below to attempt to amend this record by a construction of the opinion read in the case. Consequently we think the proper course is to reverse the decree below, to amend the entry of the judgment in this court, and at the present time to render a final decree in favor of the respondent on the basis of the decree of the chancellor."

court.<sup>1</sup> But it has been held that the defendant should not be allowed to file a supplemental bill setting up, by way of defense, matters occurring subsequently to the mandate.<sup>2</sup>

**§ 998. Construction of mandate—Resort to opinion.**—When the direction contained in the mandate is precise and unambiguous it is the duty of the circuit court to carry it into execution, and not to look elsewhere for authority to change its meaning. But when the circuit court are referred to testimony to ascertain the amount to be decreed and are authorized to take new evidence on the point, it may sometimes happen that there will be some uncertainty and ambiguity in the mandate, and in such a case the court below have unquestionably the right to resort to the opinion delivered at the time in order to assist them in expounding it.<sup>3</sup>

**§ 999. Construction of mandate continued.**—Where a decree of the circuit court was in terms “reversed” by the Supreme Court, but the case was remanded with instructions for the correction of the decree, the Supreme Court, in subsequently affirming the action of the court below, which simply corrected the error as indicated in the mandate, and refused to re-open the whole matter of inquiry, said:—“Equity regards the substance and not the form. The rights of parties are not to be sacrificed to the mere letter; and whether the language was reversed, modified, or affirmed in part and reversed in part, is immaterial. Equity looks beyond these

<sup>1</sup> *Grier v. Turner*, 36 Ark. 17, where the court said:—“The usual directions on remanding a cause, when this court deems it advisable to remand at all, are for further proceedings consistent with the law declared and facts found by the written opinion. This becomes the law of the case, and as to the facts found *res adjudicata*. Consistently with these it is not generally intended to trammel the proper courts of original jurisdiction by precluding them from any steps which may be within proper scope of the writ and neces-

sary to complete justice between the parties in reference to its subject-matter. The matters of supplementary complaint cannot have been considered on the first submission below nor here on the former appeal. They occurred *pendente lite*. Chancery delights in closing in one suit all litigation concerning the subject-matter down to the time of final submission. Otherwise it would be interminable.” See, also, *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206.

<sup>2</sup> *Mackall v. Richards*, 116 U. S. 45.

<sup>3</sup> *West v. Brashear*, 14 Pet. 51.

words of description to see what was in effect ordered to be done.”<sup>1</sup> An appeal from certain decrees, one of which ordered complainants to pay a sum for rental for one year, being computed at a uniform rate, was “reversed and the case remanded with instructions to strike out all allowances prior to the time when the receiver was appointed at the instance of the mortgagees [the end of the first four months], and to allow the rental as fixed for the time subsequent.” It was held that the court below properly construed this order as a rejection of the allowance for the four months and an affirmation of the remainder, and properly declined to re-open the whole matter of inquiry.<sup>2</sup> A mandate intended to correct part of a decree may be construed to leave the remainder unaffected, though in terms it sets the decree aside.<sup>3</sup> A decree of the appellate court was as follows: — “S. J. will be entitled to redeem the property upon paying the amount at which it was sold at sheriff’s sale, with interest. The case should be remitted to the court below, that an account may be taken under the direction of the chancellor, and S. J. permitted to redeem on equitable terms.” It was held that the appellate court did not intend to limit the terms, but to leave it to the court below to add such other terms as it should deem equitable.<sup>4</sup> A mandate from the Supreme Court directing the dismissal of a bill includes the dismissal of an amended bill on which the case was tried.<sup>5</sup> In a suit for infringement of a patent the Supreme Court reversed a decree of the court below, and remanded the cause for further proceedings in conformity with the opinion, which stated that “the complainants must be content with the protection of an injunction, and a recovery of the profits released from the infringing sales.” It was held that the court below could allow nothing by way of damages, nor could it refuse a decree for profits on the ground of a waiver thereof at the first accounting (prior to the appeal), especially where the opinion of the court showed that it was cognizant of the waiver.<sup>6</sup>

<sup>1</sup> *Kneeland v. American Loan & Trust Co.*, 188 U. S. 509, 512. See, also, *The Sabine*, 50 Fed. Rep. 215, 217; *Story v. Lexington*, 18 Pet. 373.

<sup>2</sup> *Kneeland v. American Loan & Trust Co.*, 188 U. S. 509.

<sup>3</sup> *Mackall v. Richards*, 116 U. S. 45.

<sup>4</sup> *Johns v. Norris*, 28 N. J. Eq. 147.

<sup>5</sup> *Campbell v. Jones*, 81 Fed. Rep. 525.

<sup>6</sup> *Graff v. Boesch*, 50 Fed. Rep. 660.

**§ 1000. Allowance of interest.**—Where the judgment or decree of an inferior court does not expressly award or carry interest, and the appellate court merely affirms such judgment or decree and says nothing on the subject, it is to be taken as a declaration that on the record as presented to it no interest was to be allowed.<sup>1</sup>

**§ 1001. Damages for delay.**—In the United States Supreme Court and circuit court of appeals, where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages upon affirmance of the judgment at a rate not exceeding ten per cent. in addition to interest shall be awarded upon the amount of the judgment; and the same rule applies to decrees for the payment of money in cases in equity, unless otherwise ordered by the court.<sup>2</sup> Damages cannot be awarded upon a dismissal for want of jurisdiction.<sup>3</sup> The power of the Supreme Court to award damages for delay is not limited to money judgments.<sup>4</sup>

<sup>1</sup> *In re Washington &c. R. Co.*, 140 U. S. 91, 96; *s. c.*, 11 S. Ct. Rep. 678, 674; *Green v. Chicago &c. R. Co.*, 49 Fed. Rep. 907, 909; *Boyce v. Grundy*, 9 Pet. 275. See United States Supreme Court Rule 28; Circuit Court of Appeals Rule 30.

<sup>2</sup> Supreme Court Rule 28; Circuit Court of Appeals Rule 30. See *West Wisconsin R. Co. v. Foley*, 94 U. S. 100.

<sup>3</sup> *Gregory Consolidated Min. Co. v. Starr*, 141 U. S. 222, 227.

<sup>4</sup> *Gibbs v. Diekma*, 181 U. S. 186.

## CHAPTER XXX.

### COSTS.

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| <p>§ 1002. Jurisdiction to award costs.</p> <p>1003. Power of Territorial legislature to regulate costs.</p> <p>1004. Costs discretionary.</p> <p>1005. Costs to the government.</p> <p>1006. Review of discretion on appeal.</p> <p>1007. When no costs are awarded.</p> <p>1008. The same subject continued.</p> <p>1009. Apportioning costs.</p> <p>1010. The same subject continued.</p> <p>1011. Costs against a successful defendant.</p> <p>1012. Costs against a successful complainant.</p> <p>1013. Costs out of the fund.</p> <p>1014. Costs on bills of interpleader.</p> <p>1015. Costs as between solicitor and client.</p> <p>1016. Costs in recovering a trust fund.</p> <p>1017. Costs in partition.</p> <p>1018. Costs in foreclosure.</p> <p>1019. The same subject continued.</p> <p>1020. Provisions for attorneys' fees — Federal and State practice.</p> <p>1021. Costs on bills to redeem.</p> <p>1022. Costs on bills for account.</p> <p>1023. Costs on bills for specific performance.</p> <p>1024. Costs on bills of discovery.</p> <p>1025. Costs on feigned issues.</p> | <p>§ 1026. Costs of papers unnecessarily voluminous.</p> <p>1027. Costs on exceptions to answer.</p> <p>1028. Solicitors' costs — Remedy.</p> <p>1029. Modification of decree for costs.</p> <p>1030. Enforcement of bond of interveners.</p> <p>1031. When security for costs may be required.</p> <p>1032. Security from non-resident co-plaintiff.</p> <p>1033. Security from non-resident of the district.</p> <p>1034. Security for costs on bill of interpleader.</p> <p>1035. Who may be a surety.</p> <p>1036. Amount of security required.</p> <p>1037. Order for security — Application and affidavit.</p> <p>1038. Service of order staying suit — Notice of security given.</p> <p>1039. Waiver of security.</p> <p>1040. The same subject continued.</p> <p>1041. What constitutes a waiver — Illustrations.</p> <p>1042. Suits <i>in forma pauperis</i> — Application for leave.</p> <p>1043. Taxation and retaxation of costs.</p> <p>1044. Costs on appeals.</p> |
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§ 1002. Jurisdiction to award costs.— It is a general rule that where the court has no jurisdiction it cannot adjudge costs.<sup>1</sup> But there is an exception to the rule, which is based upon clear and well-recognized reasons, that where, accord-

<sup>1</sup> Young v. The City of Florence, 56 Fed. Rep. 286.



ing to the averments of the complainant, the court has jurisdiction, and it is not until there is a disclosure by plea and evidence that the want of jurisdiction could be arrived at, the court has authority to award costs.<sup>1</sup> Where an appellate court has jurisdiction to dismiss an appeal, the right to adjudge the costs of the appeal is implied.<sup>2</sup> Where a cause is remanded by the United States Supreme Court to the circuit court with directions to remand to the State court from which it was removed, on the ground that the federal courts have no jurisdiction of the subject-matter, the costs are cast upon the party who applied for the removal of the cause.<sup>3</sup>

**§ 1003. Power of Territorial legislature to regulate costs.** The organic act of Utah Territory provides that the district courts therein shall have original jurisdiction in all causes at law and in equity; and because one of the rules of equity is that the chancellor shall dispose of costs according to his discretion, it was contended that a Territorial statute which made the granting of costs to the winning party peremptory in certain equitable actions was unauthorized and void. But it was held by the Supreme Court of Utah that the question of costs was a rightful subject of legislation, and that the regulation did not interfere with the full exercise of the equity jurisdiction of the courts.<sup>4</sup>

**§ 1004. Costs discretionary.**—In ordinary cases costs in equity rest entirely in discretion.<sup>5</sup> But the general rule is

<sup>1</sup> *Young v. The City of Florence*, 56 Fed. Rep. 286; *Lowe v. The Benjamin*, 1 Wall. Jr. 187, 188; *Thomas v. White*, 12 Mass. 370. See, also, *Miller v. Clark*, 52 Fed. Rep. 900, 902.

<sup>2</sup> *Cereghino v. Third Dist. Court (Utah)*, 32 Pac. Rep. 697. In *Miller v. Clark*, 138 U. S. 225; s. c., 11 S. Ct. Rep. 300, and *Iron Co. v. Stone*, 121 U. S. 631; s. c., 7 S. Ct. Rep. 1010, the circuit court had rendered a decree dismissing the bills on their merits. The Supreme Court, on appeal, held that the circuit court had no jurisdiction, but awarded costs in the Supreme Court.

<sup>3</sup> *Cates v. Allen*, 149 U. S. 451; s. c., 18 S. Ct. Rep. 863. When cases brought originally to the circuit court are dismissed for want of jurisdiction in such court, no costs are allowed in the circuit court. *Hornthall v. Collector*, 9 Wall. 560; *Pentlarge v. Kirby*, 20 Fed. Rep. 898.

<sup>4</sup> *Dudley v. Facer (Utah)*, 32 Pac. Rep. 668, citing *Ely v. Railroad Co.*, 129 U. S. 291, s. c., 9 S. Ct. Rep. 298, where it was said that the Territorial legislature might to some extent, at any rate, regulate the jurisdiction in equity.

<sup>5</sup> *Hammersley v. Barker*, 2 Paige,

that the costs follow the decree, unless the circumstances of the case be such as in the interest of justice to induce the court to modify the rule.<sup>1</sup> "The unsuccessful party must show the existence of circumstances sufficient to displace the *prima facie* claim to costs given by success to the party who prevails."<sup>2</sup>

372, 378; *Eastburn v. Kirk*, 2 Johns. Ch. 317; *Getman v. Beardsley*, 2 Johns. Ch. 274; *Saunders v. Frost*, 5 Pick. 260, 271; *Clark v. Reed*, 11 Pick. 446, 449; *Tomlinson v. Ward*, 2 Conn. 396; *Morris v. Peckham*, 51 Conn. 129; *Hoyt v. Smith*, 28 Conn. 467; *Bryant v. Russell*, 23 Pick. 508; *Stone v. Locke*, 48 Me. 425; *Nicoll v. Trustees of Huntington*, 1 Johns. Ch. 166; *Lee v. Pindle*, 12 Gill & J. 288; *Frisbie v. Balance*, 4 Scam. 287; *Central Trust Co. v. Central Iowa Ry. Co.*, 88 Fed. Rep. 889; *Burton v. Fort*, 18 Ark. 202; *Perkins v. McGavock*, 8 Hayw. 255; *Fechheimer v. Baum*, 48 Fed. Rep. 719, 730; *Brooks v. Byam*, 2 Story, 558; *Miller v. Clark*, 52 Fed. Rep. 900, 902, an interesting application of the rule; *Loomis v. Rutland R. Co.*, 88 Fed. Rep. 290; *Rogers v. Tyley* (Ill.), 32 N. E. Rep. 393 (a suit under the Illinois Burnt Records Act); *Shepherd v. McClain*, 18 N. J. Eq. 138, 181; *White v. Walker*, 5 Fla. 478; *Lovejoy v. Chapman* (Oregon), 32 Pac. Rep. 687. In New York "in all equity cases costs are in the discretion of whatever court passes upon the question." *Herrington v. Robertson*, 71 N. Y. 280, 284; *Sweet v. City of Syracuse*, 20 N. Y. Supl. 924. They are discretionary both at general and special term. *Knapp v. New York El. R. Co.*, 24 N. Y. Supl. 324. In actions referred to a referee costs are in the referee's discretion. *Phelps v. Wood*, 46 How. Pr. 1 (and the case last cited), holding that if the referee does not award costs the plaintiff is not authorized to tax and enter them in the judgment. See, also, *Staiger v. Schultz*, 8 Keyes, 614; *Pratt v. Styles*,

17 How. 211. An action for partition is an equitable remedy in which costs are governed by the New York Code of Civil Procedure, section 3280, and not by section 968. *Weston v. Stoddard*, 16 N. Y. Supl. 605, overruling *Davis v. Davis*, 8 N. Y. St. Rep. 168. The General Statutes of Connecticut (Rev. 1888), section 1293, provide that "the costs of an application to dissolve an injunction may be allowed and taxed by the court according to its discretion in making the final decree." It was held that where, after the denial of a motion for dissolution of an injunction, the complainant withdrew his suit and costs were thereupon taxed against him, the decree was a final decree and the court had discretionary authority to tax against him the costs of the application for dissolution. *Conlon v. Prior* (Conn.), 26 Atl. Rep. 1056. In proceedings in chancery in the nature of an amicable suit costs are not decreed. *McConnell v. McConnell*, 11 Vt. 290.

<sup>1</sup> *United States v. Southern Pac. R. Co.*, 56 Fed. Rep. 865; *Lewis v. Gale*, 14 Fla. 441; *Miller v. Clark*, 52 Fed. Rep. 900, 902; *Warren v. Burnham*, 32 Fed. Rep. 579; *Garr v. Bright*, 1 Barb. Ch. 157; *Raht v. Mining Co.*, 5 Lea, 79; *Adams' Equity* (7th Am. ed.), 391; *Gibson's Suits in Chancery*, § 564.

<sup>2</sup> *Daniell's Ch. Pr.* (5th ed.) 1881; *Catlin v. Harned*, 3 Johns. Ch. 61, 62; *Hunn v. Norton*, 1 Hopk. Ch. 344; *Bunker v. Stevens*, 26 Fed. Rep. 245; *Woodson v. Palmer*, 1 Bailey, Eq. 95; *Ward v. Davidson*, 2 J. J. Marsh. 443; *Bradford v. Allen*, *Hardin*, 1.

Costs may be allowed under a prayer in a petition for "such other relief as equity will allow."<sup>1</sup>

§ 1005. **Costs to the government.**—In England the crown does not pay costs to a subject, but it is not deemed beneath the dignity of the sovereign to receive costs.<sup>2</sup> The provision of the United States Supreme Court rule<sup>3</sup> that no costs "shall be allowed in this court for or against the United States" does not prohibit the allowance of costs of the lower courts in favor of the United States; and where a mandate from the Supreme Court directs a decree in favor of the United States, without specifying costs, the circuit court may properly include therein its own costs.<sup>4</sup>

§ 1006. **Review of discretion on appeal.**—The matter of costs is so largely within the discretion of the chancellor that except in a case where there has been a plain and palpable abuse of it his action will not be disturbed by an appellate court.<sup>5</sup> Where, in a suit by beneficiaries against their trustees, the court finds that the latter have been guilty of negligence and have not kept proper accounts, and the court has an accounting made, but refuses to remove them as trustees, it is not an abuse of discretion for the court to divide the costs and expenses of the suit between the parties.<sup>6</sup>

§ 1007. **When no costs are awarded.**—Where both parties were in the wrong neither was given costs against the other.<sup>7</sup> Where each party to a suit is partly successful costs should

<sup>1</sup> *Searle v. Fairbanks* (Iowa), 45 Fed. Rep. 571. "Under a general prayer for relief in an equitable action plaintiff is entitled to any relief in equity to which he is entitled under the facts pleaded." *Hoskins v. Rowe*, 61 Iowa, 180. See § 91, *supra*.

<sup>2</sup> 1 *Daniell's Ch. Pr.* (ed. 1854), pp. 12, 18; *Attorney-General v. Earl of Ashburnham*, 1 Sim. & S. 894.

<sup>3</sup> Rule 24, subd. 4.

<sup>4</sup> *United States v. Southern Pac. R. Co.*, 56 Fed. Rep. 865. See, also, *United States v. Sanborn*, 185 U. S. 271.

<sup>5</sup> *Putnam v. Lyon* (Colo.), 83 Pac. Rep. 492; *Ratliffe v. Dakan*, 16 Colo. 100; *Herrington v. Robertson*, 71 N. Y. 280, 289; *Canton v. Prior* (Conn.), 26 Atl. Rep. 1057; *Waterman v. Alden* (Ill.), 82 N. E. Rep. 972. See § 980 *et seq.*, *supra*, and § 1010, *infra*.

<sup>6</sup> *Waterman v. Alden* (Ill.), 82 N. E. Rep. 972.

<sup>7</sup> *Righter v. Stall* (1846), 3 Sandf. Ch. 608. See, also, *Crippin v. Heermance*, 9 Paige, 211; *Beacham v. Eckford's Ex'rs*, 2 Sandf. Ch. 142.

not be awarded to either.<sup>1</sup> Where a cause is settled by the parties out of court without any agreement as to the disposition of the suit or as to the costs, neither party is entitled to costs against his adversary.<sup>2</sup> Where complainant brought a bill against an adjoining proprietor and their common grantor to rectify his deed and quiet his title, and the defendant proprietor answered denying the existence of the alleged error, and cross-examined witnesses but produced no evidence, upon a decree for complainant no costs were awarded to either party.<sup>3</sup> Where a widow neglected to make application for her dower previous to filing her bill, and in the bill alleged that an outstanding mortgage was paid off, and insisted upon her right to be endowed of the whole premises, and claimed arrears previous to the purchase of the defendant, and the decree was against her upon all these points, no costs were allowed to either party.<sup>4</sup> Where the committee of a lunatic is sued by bill when the right of the complainant might have been settled by petition, it may be good reason for refusing costs to the complainant although he succeeds in the suit.<sup>5</sup> Where an administrator was dilatory in settling the estate and thus made a suit against him excusable, although the bill was dismissed for multifariousness, he recovered no costs.<sup>6</sup> Where a judicial sale is set aside on the ground of gross negligence or abuse of trust, the officer making such sale, as well as the purchaser acting in collusion with him, will be condemned in costs. But in the absence of actual fraud or collusion neither will be charged with costs.<sup>7</sup> Where the complainant was dead at the time suit was instituted the defendant was allowed no costs for proceeding after notice of the fact.<sup>8</sup> Where an heir or other person who is turned into a trustee by operation of law contests the complainant's claim to relief after he has full notice of his equitable rights and for his own exclusive benefit, he is not entitled to the costs of his defense.<sup>9</sup> Where a *cestui que trust* files a bill against his

<sup>1</sup> Coddington v. Idell, 30 N. J. Eq. 540; Fairchild v. Hunt, 14 N. J. Eq. 267.

<sup>2</sup> Bruce v. Gale, 18 N. J. Eq. 211.

<sup>3</sup> Graves v. Wood, 40 N. J. Eq. 65.

<sup>4</sup> Russell v. Austin, 1 Paige, 192.

<sup>5</sup> Outtrint v. Graves, 1 Barb. Ch. 49.

<sup>6</sup> Harrison v. Righter, 11 N. J. Eq. 389.

<sup>7</sup> Johnson v. Garrett, 16 N. J. Eq. 81.

<sup>8</sup> Balbi v. Duvet, 8 Edw. Ch. 418.

<sup>9</sup> Anstice v. Brown, 6 Paige, 448.

trustee for an account, and in such bill makes an unfounded claim against the trustee, and where the trustee in his answer makes an unfounded claim upon the trust fund in his hands, neither party will be entitled to costs as against the other.<sup>1</sup> If the defendant neglects to make an obvious objection that the complainant's remedy is at law, and the chancellor is thus compelled to decide the case upon its merits, he may, in his discretion, refuse to give either party the general costs of the litigation.<sup>2</sup> If a bill is demurrable and allowed by the defendant to proceed to a hearing and then dismissed for want of equity, the dismissal will be without costs.<sup>3</sup>

**§ 1008. The same subject continued.**—Where the complainant fails upon the main issues and succeeds only upon issues of trival importance, costs will not be allowed him.<sup>4</sup> In a case of great hardship, where the complainants had reason to suppose that the conduct of the defendants was fraudulent until they put in their answer, which fully explained the circumstances of the case, the court dismissed the bill without costs.<sup>5</sup> Where a plaintiff claimed as legatee and as a creditor and proved only his right as legatee, and the defendants, executors, had caused great expense and delay by raising unfounded objections, neither party was held entitled to costs.<sup>6</sup> On a bill for dower where the widow had never claimed her dower, and there was no opposition or vexation on the part of the defendants, costs were denied her, though she had a decree.<sup>7</sup> Where both parties are equally innocent, and both are endeavoring to avoid a loss caused by others, costs will not be awarded to either party as against the other.<sup>8</sup> Where a plaintiff had color of claim, though barred in the opinion of

<sup>1</sup> *Spencer v. Spencer*, 11 Paige, 299. complainant to the injunction. *Otis v. Forman*, 1 Barb. Ch. 30.  
<sup>2</sup> *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 607.

<sup>3</sup> *Dawes v. Taylor*, 85 N. J. Eq. 40. <sup>4</sup> *Marks Adjustable Chair Co. v. Wilson*, 48 Fed. Rep. 302.

See, also, *Walker v. Day*, 36 N. J. Eq. 76. <sup>5</sup> *Lupin v. Marie*, 2 Paige, 170.

Costs will not in general be given to a defendant upon the dissolution of an injunction, on bill and answer, where the bill was insufficient upon its face to entitle the <sup>6</sup> *Brown v. Ricketts*, 4 Johns. Ch. 303.

<sup>7</sup> *Hazen v. Thurber*, 4 Johns. Ch. 604.

<sup>8</sup> *Pendleton v. Eaton*, 3 Johns. Ch. 69.

the court by lapse of time, his bill was dismissed without costs.<sup>1</sup> Where a plaintiff had probable cause for bringing a suit, but failed in establishing his title, and the defendant showed no better claim or title on his part, the bill was dismissed without costs on either side.<sup>2</sup> The rule is that if a suit is settled or compromised without any agreement as to costs each party must bear his own.<sup>3</sup> Costs were refused to a complainant on a decree in his favor where it appeared that the matter had been before submitted to arbitration, and the decree varied but little from the award.<sup>4</sup> A purchaser of land chargeable with constructive notice only of a trust by means of a *lis pendens* is not to be charged with costs, there being no actual fraud, though the purchase is set aside on the ground of the implied fraud.<sup>5</sup> If a suit is abated by the death of a party no costs can be given.<sup>6</sup> But an exception has been made to the general rule in cases where the costs are payable out of a particular fund, or are connected with a duty towards the party claiming costs.<sup>7</sup>

§ 1009. Apportioning costs.—In deciding the question of costs the court will frequently apportion them so as to cause the costs of one part of the suit to fall upon one party, and those of another part to fall upon the other party.<sup>8</sup> A party

<sup>1</sup>Demarest v. Wynkoop, 8 Johns. Ch. 129.

<sup>2</sup>Nicoll v. Trustees of Huntington, 1 Johns. Ch. 166.

<sup>3</sup>Stewart v. Ellice, 2 Paige, 604.

<sup>4</sup>Freeland v. Mannahan, Hopk. Ch. 276.

<sup>5</sup>Murray v. Ballou, 1 Johns. Ch. 568.

<sup>6</sup>Pells v. Coon, Hopk. Ch. 450, 452. Where a sole plaintiff or defendant dies pending the suit, no costs are given if the complainant or his representative elect not to proceed. Benson v. Wolverton, 16 N. J. Eq. 110.

<sup>7</sup>Sears v. Jackson, 11 N. J. Eq. 45.

<sup>8</sup>Preece v. Seale, 3 Jur. (N. S.) 711; Crandall v. Hoysradt, 1 Sandf. Ch. 40; Clinan v. Cooke, 1 Sch. & Lef.

22, 43; Waterman v. Alden (Ill.), 39 N. E. Rep. 972; Farwell v. Kerr, 28 Fed. Rep. 845. Where a wife joined her husband in the mortgage of store property to one-twentieth of which she held the legal and equitable title, but previously required him to convey to herself several pieces of property, one of which was the west half of the block occupied by them as a homestead, as consideration thereof, and on the ground that her husband received from her father, after her marriage, considerable money used in the building of the store, and the judgment creditors filed a bill as complainants to set aside said conveyance of the husband to the wife, it was held that under the peculiar circumstances of the case the con-

entitled to the general costs of a suit may nevertheless be ordered to pay such of the costs as were incurred by his litigating groundless claims.<sup>1</sup> Where a suit is necessary to wind up a partnership it is proper to divide costs.<sup>2</sup> When the main controversy in a bill is decided against the complainant, although he succeed in obtaining a decree, the defendant will be entitled to have his costs up to the time of the decision of the main controversy.<sup>3</sup> Where a bill is sustained with costs against certain respondents and dismissed with costs as against others, the latter are entitled not only to have taxed items special to their defense but also to have apportioned in their favor the items which were of a joint character.<sup>4</sup> Upon a decree reforming a conveyance as prayed in the bill it is a proper exercise of discretion to require the complainant as a condition precedent to pay the defendant a sum of money improperly in the consideration, and divide the costs equally between

veyance be sustained as to the homestead and be decreed void as to the remainder of the property; that each party pay the costs of its own testimony, and the other costs of the case go against the defendants. *Farwell v. Kerr*, 28 Fed. Rep. 345.

<sup>1</sup> *Dupont v. Johnson*, 1 Bailey's Eq. 279. In *Blest v. Brown*, 4 De G., F. & J. 367, a plaintiff, though successful, was ordered to pay all costs occasioned by unsustained charges in the bill.

<sup>2</sup> *Jones v. Morehead*, 8 B. Mon. 377.

<sup>3</sup> *McConnell v. McConnell*, 11 Vt. 290. A second mortgagee of land brought a bill in equity against the first mortgagee to redeem the first mortgage and tendered a less amount than was really due; the defendant, who had previously, on request, rendered an account, claiming the allowance of a greater sum than was found to have been then due by the auditor to whom the case was afterwards referred, alleged in his answer that the plaintiff's mortgage was fraudulent and void as to creditors for want of consideration, and also

that it ought to be postponed to a subsequent mortgage of a part of the same land to the defendant, taken by the defendant on representations of the plaintiff that nothing remained due on his mortgage; a jury, on issues submitted to them, found that the plaintiff's mortgage was made for good consideration, but that the plaintiff did make the representations charged against him by the defendant; and the court thereupon, at the next law term, postponed the plaintiff's mortgage to the subsequent mortgage of the defendant; and at a subsequent term refused to allow the plaintiff to proceed under his bill to redeem the subsequent mortgage or to amend his bill for that purpose. Costs were allowed to the defendant for the term at which the issues were tried before the jury and for the succeeding law term, but no more; and the auditor's fees were ordered to be paid equally by both parties. *Platt v. Squire*, 5 Cush. 551.

<sup>4</sup> *American Box Match Co. v. Crosman*, 57 Fed. Rep. 1029. See, also, *Heighington v. Grant*, 1 Beav. 230.

them.<sup>1</sup> Where, after a decree for the plaintiff, on motion of the defendant a rehearing was had and a decree made dismissing the bill, the plaintiff was given costs to the motion for rehearing and the defendant costs subsequent thereto.<sup>2</sup>

§ 1010. The same subject continued.—As a general rule costs in equity may be decreed against either party, or may be apportioned in the discretion of the chancellor; and an error in this regard, if there be nothing more in the case, is no ground for reversal on appeal.<sup>3</sup> But to call this discretion into exercise, the cause, either in whole or in part, must have been submitted to him for decision and decree; and this is not done where the complainant dismisses his own suit, thereby assuming the costs he has caused.<sup>4</sup> But where the defendant after answer filed buys his peace, or purchases the complainant's asserted cause of action, the complainant binding himself to dismiss his suit, but failing to do so, whereby the defendant is forced to set up the release by supplemental or amended answer, and the cause is then submitted on his motion to dismiss the bill in accordance with the stipulation in the release, the judicial functions of the court are called into exercise, and the decree for costs is not reviewable.<sup>5</sup>

<sup>1</sup> Connor v. Armstrong, 91 Ala. 265.

<sup>2</sup> Hake v. Brown, 44 Fed. Rep. 288. Where a suit for infringement fails upon one patent and prevails upon another the complainant is entitled to a decree; but the costs should be equitably apportioned. Penn Diamond Drill Co. v. Simpson, 29 Fed. Rep. 288. But see Schmid v. Scoville Mfg. Co., 87 Fed. Rep. 346. Where, on a bill and cross-bill, each party claimed more than he was entitled to, but the complainant in the original suit mainly succeeded, he was allowed his costs of that suit out of the fund, and all the other costs were directed to be borne by the respective parties who incurred them. Craig v. Tappin, 2 Sandf. Ch. 78. The grantees of a lease alleged that the lessor claimed that the lease would ter-

minate with the death of the original lessee, and asked for a reformation of the lease if such was its construction. The lessor answered, asserting such claim, and testimony was taken showing that the lease was to be terminable by the election of the lessor to take certain property on the leased premises at its value, and the lessor submitted to a decree establishing such construction. It was held that the orators were entitled to the costs of taking their testimony and the decree, but not to the costs of the bill. Loomis v. Rutland R. Co., 38 Fed. Rep. 280.

<sup>3</sup> Allen v. Lewis, 74 Ala. 379, 381.

<sup>4</sup> Allen v. Lewis, 74 Ala. 379. See § 461, *supra*.

<sup>5</sup> Allen v. Lewis, 74 Ala. 379.



§ 1011. **Costs against a successful defendant.**— A defendant not unfrequently is guilty of such unconscientious conduct in connection with the litigation that, though successful, it would be inequitable to burden the complainant with the costs. The following are cases where the defendant, though successful, should be charged with the costs:<sup>1</sup>— 1. Where, as administrator, executor, guardian or trustee, he failed to file proper inventories or make the settlements required by law, in consequence whereof suit was brought for an account.<sup>2</sup> 2. Where the suit was caused by the defendant falsely claiming to be heir, executor, partner, or the like.<sup>3</sup> 3. Where a suit for specific performance was dismissed because the defendant had no title.<sup>4</sup> 4. Where his vacillating conduct caused or prolonged the litigation, he obtaining benefits once informally renounced.<sup>5</sup> 5. Where his negligence or mistake of law caused the litigation.<sup>6</sup> 6. Where he succeeds on the plea of bankruptcy;<sup>7</sup> or 7, on the defense of a former adjudication set up in his answer, but without merits.<sup>8</sup>

§ 1012. **Costs against a successful complainant.**— It is not enough that a complainant obtains a decree; he must also be without fault if he would escape costs. And so a complainant may be successful and without fault, and yet the defendant may also be wholly without fault, in which case it would be manifestly inequitable to burden the latter with all the costs of a suit instituted for the complainant's benefit. The following are cases where the complainant, though successful, should be charged with the costs if the defendant be free from wrong:<sup>9</sup>— 1. In a suit by complainant to quiet his title, defendants claiming nothing. 2. Where the defendant is a mere stakeholder. 3. Where the defendant seeks to redeem after mortgage forfeited. 4. Where a full tender was made before suit. 5. Where the defendant is administrator or exeo-

<sup>1</sup> Gibson's Suits in Chancery, § 568.

<sup>2</sup> Gentry v. Gentry, 1 Sneed, 87.

<sup>3</sup> 1 Daniell's Ch. Pr. (5th ed.) 1416, 1417.

<sup>4</sup> Fraker v. Brazleton, 12 Lea, 281; Wray v. Williams, 2 Yerg. 302.

<sup>5</sup> Adams' Equity, 389; 2 Daniell's Ch. Pr. (5th ed.) 1405; Pigue v. Young, 1 Pickle (Tenn.), 263.

<sup>7</sup> Payne v. Beech, 2 Tenn. Ch. 711.

<sup>8</sup> Arnold v. Kyle, 8 Baxt. 319; Gibson's Suits in Chancery, § 568.

<sup>6</sup> Adams' Equity, 389.

<sup>9</sup> Gibson's Suits in Chancery, § 567.

utor without assets, and the complainant knew that fact.<sup>1</sup> 6. Where the defendants are heirs, claiming nothing, and especially if they are minors. 7. Where an infant, on attaining majority, sues to have his deed set aside, the defendant being guilty of no fraud.<sup>2</sup> 8. Where a married woman takes advantage of her coverture and recovers, the defendant having done nothing inequitable.<sup>3</sup> 9. Where a vendor compels specific performance, but has not shown a good title before suit.<sup>4</sup> 10. Where complainant was greatly in fault but the strict law was in his favor. 11. Where complainant has obtained a bargain oppressive to the defendant. 12. Where the complainant recovers, but claimed greatly too much.<sup>5</sup> 13. Where the defendant offered a reasonable settlement before suit.<sup>6</sup> 14. Where a complainant has been guilty of laches.<sup>7</sup> Where a debtor makes an agreement to prefer a certain creditor, and a subsequent creditor brings suit to set aside such agreement, the latter will be entitled to costs, though he fail in his suit, where it appears that his ignorance of the agreement caused him to give the debtor credit, whereby he suffered a loss.<sup>8</sup>

§ 1018. *Costs out of the fund.*—Costs when awarded are not always directed to be paid by one party to another. Whenever an estate, whether real or personal, is the subject of litigation, the court will, in general, order the costs of the suit, or those of some of the parties to it, to be defrayed out of the fund or estate.<sup>9</sup> Trustees, agents and receivers accounting fairly, and paying their money into court, are entitled to their costs out of the estate as a matter of course.<sup>10</sup> The same rule extends to personal representatives.<sup>11</sup> Thus where an ad-

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1881-1400.

<sup>2</sup> Barker v. Wilson, 1 Heisk. 271.

<sup>3</sup> Durant v. Davis, 10 Heisk. 524.

<sup>4</sup> Adams' Equity, 889.

<sup>5</sup> 2 Daniell's Ch. Pr. (5th ed.) 1898, 1899.

<sup>6</sup> 2 Daniell's Ch. Pr. (5th ed.) 1894-1896; Coal Creek M. & M. Co. v. Moses, 15 Lea, 811; Perkins v. McGavock, 3 Hay, 257.

<sup>7</sup> 2 Daniell's Ch. Pr. (5th ed.) 1898; Bracken v. Martin, 3 Yerg. 55; Gibson's Suits in Chancery, § 587.

<sup>8</sup> Fechheimer v. Baum, 43 Fed. Rep. 719. Where a bill was filed to establish a resulting trust, and there was no evidence that the answering defendant knew of the trust, he was held entitled to his costs. Third National Bank v. Cary, 39 N. J. Eq. 25.

<sup>9</sup> 2 Barbour's Ch. Pr. (2d ed.) 828.

<sup>10</sup> Attorney-General v. City of London, 1 Ves. Jr. 246.

<sup>11</sup> Rashley v. Master, 1 Ves. Jr. 205; Knatchbull v. Fearnhead, 8 Myl. & C. 122; Decker v. Miller, 3 Paige, 149; Knox v. Pickett, 4 Desaus. 199.

ministrator or trustee resists a claim, and litigates *bona fide* from a conviction of duty, without any intentional default, he will not be charged personally with the costs, but they will be ordered to be paid out of the assets.<sup>1</sup> So where he submits to, and asks the direction of the court on, a bill filed by a legatee.<sup>2</sup> The rule is not confined to cases in which they are brought before the court as defendants. It is a general principle that a trustee has a right to the protection of the court in the execution of his trust. He is therefore entitled to his costs, whether he comes before the court as complainant or defendant, unless the act required to be done leads to no responsibility, or his motive is obviously vexatious.<sup>3</sup> And a trustee fairly instituting a suit will not only be entitled to his own costs, but any person made a party to the suit for his protection will also be awarded his costs from the fund.<sup>4</sup> Where, however, the act required to be done by a trustee leads to no responsibility, or his motive is obviously vexatious, he will not be allowed his costs. Thus, where trustees under a will refused to pay a legacy to the assignees of a bankrupt, merely because the bankrupt himself had set up a claim to it, they were refused their costs of the suit.<sup>5</sup> So where a trustee, from caprice or obstinacy, occasions a suit which would otherwise be unnecessary, he will not be allowed the costs of it whether he is complainant or defendant. Therefore where a person, having in his hands a sum of money belonging to an infant, instituted a suit to have the money secured for the benefit of the infant, though there was a trustee of a settlement to whom it ought to have been paid, and who was willing to receive it,

<sup>1</sup> *Moses v. Murgatroyd*, 1 Johns. Ch. 478; *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508; *Hosack v. Rogers*, 9 Paige, 461.

<sup>2</sup> *Morrell v. Dickey*, 1 Johns. Ch. 158.

<sup>3</sup> *Curteis v. Caudler*, Mad. & Geld. 128; *Hosack v. Rogers*, 9 Paige, 461.

<sup>4</sup> *Curteis v. Caudler*, Mad. & Geld. 128; *Hosack v. Rogers*, 9 Paige, 461; *Hicks v. Wrench*, Mad. & Geld. 98; *Henly v. Phillips*, 2 Atk. 48; *Taylor v. Glanville*, 8 Mad. 176.

<sup>5</sup> *Knight v. Martin*, 1 Russ. & My. 70.

Where the complainants were not wholly successful, but the necessity of filing the bill was occasioned by the misconduct of the defendants as executors in omitting to inventory, and in refusing to account for moneys which were due the estate, no costs were allowed to the executors out of the estate. *Post v. Stevens*, 18 N. J. Eq. 298. But where the suit is brought in bad faith by the complainant, an executor, he will be ordered to pay the costs out of his own estate; and when brought upon an instrument

the court refused to allow him his costs out of the fund.<sup>1</sup> Trustees and personal representatives brought into court will not be deprived of their costs, although they make a claim for their own benefit and fail; provided they do so "by way of submission."<sup>2</sup> But the courts will not tolerate trustees in attempting to defeat the claims of their *cestui que trust* by setting up an improper defense<sup>3</sup> or in stating the trust to be different from what it really is.<sup>4</sup> They will also be deprived of their costs if they claim more than they are entitled to.<sup>5</sup> Where executors who have no interest in the question are made defendants in chancery they are entitled to their costs out of the fund.<sup>6</sup> Where a person is made a party to a creditors' bill to enable the complainant to obtain a debt due from him to the judgment debtor, which debt such person is ready and willing to pay, he is entitled to his costs out of the fund.<sup>7</sup> Creditors applying to prove their debts against a testator's estate are to be allowed all costs incident to it out of the fund.<sup>8</sup> Where a trustee appeals from the decree in a suit brought by him to construe the trust, his expenses in prosecuting such appeal are not chargeable to the trust fund.<sup>9</sup> A claimant of a trust fund under a will will not be allowed costs out of the fund if there was no reasonable ground for the claim.<sup>10</sup> It seems that a creditor is not allowed the costs of proving his claim before the master upon the accounts of receivers. But a creditor excepting to the master's report may be allowed his costs to be paid out of the fund, or by the receivers, at the discretion of the court.<sup>11</sup> A creditor who came in after the master had filed his report and obtained leave to prove his debt without stipulating to contribute to

obtained by the decedent by a breach of faith, costs will be ordered to be paid out of the estate of the testator. *Shepherd's Ex'x v. McClain*, 18 N. J. Eq. 128.

<sup>1</sup> *Ellis v. Ellis*, 1 Russ. 368. See, also, *O'Callaghan v. Cooper*, 5 Ves. 129; *Howard v. Rhodes*, 1 Keen, 581; *Hide v. Haywood*, 2 Atk. 126; *Dawson v. Parrot*, 8 Bro. C. C. 386.

<sup>2</sup> *Rashley v. Master*, 1 Ves. Jr. 205.

<sup>3</sup> *Lloyd v. Spillet*, 8 P. Wms. 846.

<sup>4</sup> *Ball v. Montgomery*, 2 Ves. Jr. 191.

<sup>5</sup> *Attorney-General v. The Brewers Co.*, 1 P. Wms. 376.

<sup>6</sup> *Delafield v. Colden*, 1 Paige, 189.

<sup>7</sup> *Stafford v. Mott*, 8 Paige, 100.

<sup>8</sup> *In re Howe*, 2 Edw. Ch. 484.

<sup>9</sup> *Sherman v. Leman*, 187 Ill. 94; s. c., 27 N. E. Rep. 57.

<sup>10</sup> *Stratton v. Phisio-Medical College*, 149 Mass. 505.

<sup>11</sup> *Richards v. Morris Canal & Banking Co.*, 4 N. J. Eq. 428.

the costs of the suit brought by the other creditors against the executors, the assets not being sufficient to pay all the debts proved, was not allowed his costs out of the fund.<sup>1</sup>

**§ 1014. Costs on bills of interpleader.**— Where a bill of interpleader is properly filed the complainant is entitled to his costs out of the fund.<sup>2</sup> But if the bill is unnecessarily filed,<sup>3</sup> or if he omits to make necessary parties defendant, and thus compels the filing of another bill, he will not be allowed his costs.<sup>4</sup> On a bill of interpleader one of the defendants who suffered a default was ordered to pay the costs of the other defendant and of the plaintiff, the latter to be paid in the first instance out of the fund in court.<sup>5</sup> Costs are usually given as between party and party;<sup>6</sup> but in a case of fraudulent collusion the plaintiff and his solicitor were ordered to pay the defendant to a bill of interpleader which was dismissed all his expenses as between attorney and client.<sup>7</sup> If the ambiguity of a will renders it doubtful to which of two persons a legacy shall be paid, costs as between solicitor and client of all parties to a bill of interpleader by the executor are to be paid out of the general estate of the testator.<sup>8</sup> Costs of counsel fees, to be taxed as between solicitor and client, will not be allowed to the losing party to a bill of interpleader, where the only cause of the suit is his unjust claim to property in the hands of the plaintiff.<sup>9</sup> Costs paid out of

<sup>1</sup> *Mason v. Codwise*, 6 Johns. Ch. 188.

<sup>2</sup> *Aymer v. Gault*, 2 Paige, 284; *Palmer v. Elliott*, 4 Edw. Ch. 648; *Thomson v. Ebbets*, Hopk. Ch. 272; *Canfield v. Morgan*, Hopk. Ch. 224. On a bill in the nature of a bill of interpleader costs are not a matter of right, but rest in the discretion of the court. *Bedell v. Hoffman*, 2 Paige, 199; *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268; *Child v. Mann*, L. R. 3 Eq. 806, 809; *Mason v. Hamilton*, 5 Sim. 19; *Aldridge v. Thompson*, 2 Bro. C. C. 150 and n. (a); *Jones v. Gilham*, 1 Coop. 49.

<sup>3</sup> *Bedell v. Hoffman*, 2 Paige, 199.

<sup>4</sup> *Palmer v. Elliott*, 4 Edw. Ch. 648.

<sup>5</sup> *Richards v. Satter*, 6 Johns. Ch. 445; *Badeau v. Rogers*, 2 Paige, 209. Where a bill of interpleader was obviously demurrable, but the defendant answered and went to a hearing upon pleadings and proofs, upon a dismissal of the bill the defendant was only allowed the costs to which he would have been entitled had the bill been dismissed upon the demurrer. *Shaw v. Coster*, 8 Paige, 339.

<sup>6</sup> *Dunlop v. Hubbard*, 19 Ves. 205; *Dowson v. Hardcastle*, 2 Cox, 279.

<sup>7</sup> *Dungey v. Angove*, 2 Ves. Jr. 818.

<sup>8</sup> *Morse v. Stearns*, 181 Mass. 389.

<sup>9</sup> *Cobb v. Rice*, 180 Mass. 281.

the fund to the plaintiff are usually decreed to be repaid by the unsuccessful defendant.<sup>1</sup>

§ 1015. **Costs as between solicitor and client.**—Costs payable out of a fund in court are termed costs as between solicitor and client.<sup>2</sup> One jointly interested with others in a common fund and who in good faith maintains the necessary litigation to save it from waste and destruction, and secure its proper application, is entitled in equity to reimbursement of his costs as between solicitor and client, either out of the fund itself or by proportional contribution from those who receive the benefit of the litigation. But he is not entitled to an allowance for his private expenses, such as traveling fares and hotel bills; nor for his own time or personal services.<sup>3</sup> “The fee-bill is intended to regulate only those costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowances to the parties out of the fund as justice and equity may require.”<sup>4</sup> A solicitor’s fee for services in obtaining the judgment at law upon which the proceeding in equity is based cannot be allowed.<sup>5</sup> As the allowance of costs to a trustee rests in the discretion of the court, a master in taking an account in anticipation of a decree, and before the question of costs has been disposed of by the court, is not authorized to credit the trustee with costs as between solicitor and client unless directed to do so in the order of reference.<sup>6</sup> As between party and party, the counsel for the

<sup>1</sup> *Martinius v. Helmuth*, 2 V. & B. 412, note; *Badeau v. Rogers*, 2 Paige, 202. See *Ferguson v. Dent*, 46 Fed. Rep. 88.

<sup>2</sup> *Trustees v. Greenough*, 105 U. S. 527.

<sup>3</sup> *Trustees v. Greenough*, 105 U. S. 527. The power of the court to allow to the complainant a solicitor’s fee to be taken as costs or to be taken from the fund before distribution, is, at best, dangerously arbitrary, and ought not to be extended to doubt-

ful cases. *Lippincott v. Shaw Carriage Co.*, 34 Fed. Rep. 570, 578.

<sup>4</sup> Per Justice Bradley in *Trustees v. Greenough*, 105 U. S. 527, 535. See, also, *Feicheimer v. Baum*, 43 Fed. Rep. 719; *Central R. & Co. v. Petrus*, 113 U. S. 116, 128; *Ex parte Jaffray*, 1 Lowell, 321; *Cowdrey v. G. H. & Co. R. Co.*, 98 U. S. 352; *Ex parte Plitt*, 2 Wall. Jr. 453.

<sup>5</sup> *Adams v. Kehlor Mining Co.*, 33 Fed. Rep. 281.

<sup>6</sup> *Hosack v. Rogers*, 9 Paige, 461.

complainant has in no case a right to be paid extra counsel fees out of a fund belonging to a defendant, except where the counsel has been employed to obtain or create such fund for the joint benefit of both parties.<sup>1</sup> When a suit is necessary in the proper administration of a fund given by will, its costs and a reasonable counsel fee may be allowed, out of the fund, to a suitor who makes an unsuccessful claim to the fund.<sup>2</sup> The costs of all parties to a bill brought by the directors of a trading association against the members for contribution towards payment of debts and for winding up the concern, to be taxed as between solicitor and client, are to be assessed ratably upon all the solvent members; all those who are represented by a single solicitor to be allowed but a single bill of costs.<sup>3</sup> In taxing costs for counsel fees to be paid out of the fund in controversy the court will not allow all charges which may be proper in the particular case, as between counsel and client, but will refer as a general guide to the compensation usually paid to public officers for services of a similar character.<sup>4</sup> Where a creditor is successful in a suit against the debtor and the executors of an estate to compel the latter to account to him instead of to the debtor, the expenses and counsel fees of the executors are a proper charge upon the fund in their hands.<sup>5</sup>

**§ 1016. Costs in recovering a trust fund.**—In suits where one person incurs expense in rescuing property for the benefit of many, a court of equity has power to direct that the expenses so incurred shall be paid from the common fund.<sup>6</sup>

<sup>1</sup> *Ryckman v. Parkins*, 5 Paige, 543, 545.

<sup>2</sup> *Noe's Adm'r v. Miller's Ex'r*, 81 N. J. Eq. 234.

<sup>3</sup> *Tyrrell v. Washburn*, 6 Allen, 467.

<sup>4</sup> *Frost v. Inhabitants of Belmont*, 6 Allen, 152.

<sup>5</sup> *Ricketson v. Merrill*, 148 Mass. 76. Where the interests of the parties are adverse, nothing beyond the legal taxable costs can be allowed to one party as against the other. *Ryckman v. Parkins*, 5 Paige, 543, 545. It must be a very special case to authorize the court to allow anything beyond the taxable costs of the guardian *ad*

*item* to be charged upon a fund belonging to an infant. *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85.

<sup>6</sup> *Merwin v. Richardson*, 52 Conn. 225. In *Trustees v. Greenough*, 105 U. S. 527, Justice Bradley said:—"It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either

This principle was applied in a suit brought by a trustee in insolvency to recover property for the common benefit of all

out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. This has long been the rule in relation to proceedings for restoring property to the uses of a charity, which has been unjustly diverted therefrom. Thus in *Attorney-General v. The Brewers' Company*, 1 P. Wms. 376, Lord Chancellor Cowper allowed costs to the relators out of the improved rents which they received for the charity, 'for that they had been serviceable to the charity by easing them of the six hundred and twenty pounds' debt which was claimed against them.' In *Attorney-General v. Kerr*, 4 Beav. 297, it is conceded to be the general rule that the relator in a charity information, upon obtaining a decree, is entitled to his costs as between solicitor and client. In that case they were not allowed out of the general charity estate, but were charged upon the particular property recovered. The same rule was followed in *Attorney-General v. South Society*, 18 Allen, 479. Of course it is well understood that costs as between solicitor and client include all reasonable expenses and counsel fees, and are not, like costs as between party and party, confined to the taxed costs allowed by the fee-bill. This difference is pointed out in *In re Paschal*, 10 Wall. 483, 493. The same rule is applied to creditors' suits, where a fund has been realized by the diligence of the plaintiff. In England, where specialty creditors have a preference, a simple contract creditor who recovers a fund for the general benefit is allowed his costs, as between party and party, out of the fund in preference to all other claims; and the

balance of his costs, as between solicitor and client, are to be paid either out of the fund or *pro rata* by all the creditors who partake of the benefit of the suit. This was the judgment in *Thompson v. Cooper*, 2 Col. C. C. 87. In the latter case Vice-Chancellor Knight Bruce said:—'Having come in and proved and obtained the benefit of the suit which was instituted on their behalf, as well as that of the plaintiff, it cannot be just that in such a suit—a suit instituted for the benefit of all the creditors—one alone should bear the burden when others have the benefit.' To the same purport are *Tootal v. Spicer*, 4 Sim. 510; *Larkins v. Paxton*, 2 Myl. & K. 320; *Barker v. Wardle*, 2 Myl. & K. 818; *Sutton v. Doggett*, 3 Beav. 9. The rule that a party who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses paid out of the fund prevails in bankruptcy cases. In *Worrall v. Harford*, 3 Ves. Jr. 4, Lord Eldon said:—'The petitioning creditor is answerable till the assignment. Can there be a doubt that the assignees, if there be nothing special in the deed, would have a clear right to pay all the expenses incurred? It would be implied if not expressed.' This rule has been followed by the district courts of the United States. See a forcible opinion of Judge Bryan, in *In re Williams*, 2 Bank. Reg. 28, in the district court of South Carolina; and in the *Matter of O'Hara*, 8 Law Reg. (N. S.) 113, in the western district of Pennsylvania. In a case in Massachusetts, before Judge Lowell, the same rule was adopted. The petitioning creditors charged as an act of bankruptcy the execution of a mort-



the creditors in opposition to the claim of defendants, creditors and holders of the legal title, to the exclusive benefit of

gage by the debtors, and having succeeded, after much opposition, in substantiating the charge, they asked that counsel fees should be allowed them out of the estate. The remarks of Judge Lowell are so apposite, and seem to us so well considered, that we quote from his opinion. 'A petition *in invitum*,' says he, 'to have a debtor adjudged bankrupt is for the benefit of all his unsecured creditors; and a favorable decree gives them all a proportionate advantage, and the court has no power to order, as is often done in chancery, that this advantage shall depend upon their contributing to the expenses of the suit; but any creditor may carry on the proceedings if the petitioner should refuse to do so; and after adjudication all may have their debts. In this case the fund from which the dividend will be paid is due entirely to the exertions of the petitioners in setting aside the mortgage; and in most cases, though not in this, no single creditor, nor any three or four of them, have a sufficient interest to enable them to undertake the conduct of the proceedings without positive loss of money if they cannot tax the expenses on the fund, for those expenses will usually exceed the dividend on their debts. . . . The strong equities of the petitioner's case are not difficult to discover; and the practice under the act of 1841 was to allow such a charge out of the assets, as I find by examining the records. My doubt was of my power in the premises under the fee-bill of 26th February, 1853 (10 Stat. 161), which does not appear to sanction it, and does appear to be intended to cover the whole ground of taxation of costs at law and in equity and ad-

miralty; and by the general orders, these petitions follow the rule of cases in equity in all matters of costs. Upon reflection, I have concluded that the fee-bill is probably intended to reach only taxable costs commonly so called, and may have its full effect without being construed to take away the power of a court of equity to permit counsel fees to be taxed in those cases where a fund is in court upon or to which different parties have distinct rights or claims. . . . I have been referred to the record of a case in equity in the circuit court in which Judge Sprague, since the passage of the fee-bill, ordered the counsel fees of all parties to be paid out of the fund; and Judge Kane adopted a like rule in *Ex parte Plitt*, 2 Wall. Jr. 458. These decisions, and those in bankruptcy already cited, justify me in construing the statute in the way which the equities of the case so clearly demand.' The views here expressed with regard to the application of the fee-bill to cases of this sort are undoubtedly correct. The fee-bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require. The fee-bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in

the same.<sup>1</sup> A trust deed given to secure the bonds of a manufacturing company provided for payment of the trustee's expenses upon a sale by him under the powers contained in the deed. The trustee, however, foreclosed by suit, which course was probably necessary because of a prior foreclosure sale in the State court. The suit was brought on request of certain bondholders, and the trustee had refused to act except under a stipulation that he should not be liable for attorneys' fees. It was held that he was not entitled, as a matter of right, to have attorneys' fees taxed.<sup>2</sup>

**§ 1017. Costs in partition.**—In partition suits, where an actual partition of the premises is decreed, the costs of the complainant and of all the defendants who have appeared in the cause are to be taxed as between party and party, and the aggregate amount of their several bills apportioned and charged upon the parties to the suit, according to their respective rights and interests in the premises; and the parties

in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties. Act of February 26, 1858, ch. 80 (10 Stat. 161; Rev. Stat., § 823). And the act contains nothing which can be fairly construed to deprive the court of chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceeding for the benefit of a general fund."

<sup>1</sup> *Merwin v. Richardson*, 53 Conn. 225.

<sup>2</sup> *Robinson v. Alabama & G. Manuf. Co.*, 51 Fed. Rep. 268, following *Fowler v. Trust Co.*, 141 U. S. 384, and distinguishing *Dodge v. Tulley*, 144 U. S. 451; s. c., 12 S. Ct. Rep. 728. Where in the foreclosure of a railroad mortgage the complainant is the holder of a majority of the bonds secured, and the trustee, by

agreement with the complainant, has declined to act in the foreclosure proceedings, and is made a co-defendant, and full allowance has been made to the counsel of complainant and to the receiver for his services, all for duties which by the mortgage were assigned to the trustee, it was not error to refuse an allowance also to the trustee's counsel. *Investment Co. of Philadelphia v. Ohio & N. W. R. Co.*, 46 Fed. Rep. 696. Upon foreclosure of a mortgage for \$145,000 and interest, a decree was entered on default, and the property bought in by one of the bondholders for less than the mortgage debt. An allowance of \$1,000 was made to the mortgagee, a trust company, and of \$500 to its counsel. It was held that no further allowance to the trustee for services or counsel fees was warranted by the facts of the case. *Boston Safe-Deposit & Trust Co. v. Adrian (Mich.) Water-works*, 47 Fed. Rep. 8.

whose taxed bills exceed their ratable proportions of the whole costs are entitled to execution against those whose taxed bills are less.<sup>1</sup> Counsel fees do not properly constitute a part of the costs and expenses to be charged against the owners of the several shares.<sup>2</sup> Two defendants in a partition suit put in separate and merely formal answers. It was held that the fact that they were merely formal, and put in by the same solicitor, did not disentitle those defendants to the costs thereof.<sup>3</sup> Where the complainant in a bill for partition set up an unfounded claim he was charged with the additional costs occasioned thereby.<sup>4</sup>

§ 1018. *Costs in foreclosure.*— On a decree of foreclosure the mortgagee is generally entitled to costs as against the mortgagor.<sup>5</sup> A mortgagee upon a bill for foreclosure was allowed his taxed costs of an issue at law directed by the court to try the mortgagor's title to a part of the mortgaged premises, although the verdict at law was adverse to the claim of the mortgagor, such costs being, in the opinion of the court, expenses properly incurred in the recovery of the mortgage money.<sup>6</sup> In a suit to foreclose a lost mortgage, the mortgagor cannot resist payment of either principal or costs on the ground of a refusal to indemnify him.<sup>7</sup> A mortgagee, being a defendant, in his answer set up his mortgage and an interest in the premises under a tax lien, which latter claim was decided against him; as it did not appear that the claim was in bad faith, it was held he was entitled to his costs.<sup>8</sup>

<sup>1</sup> *Tibbits v. Tibbits*, 7 Paige, 204; *decker v. Bowen*, 15 R. I. 52; s. c., 28 Atl. Rep. 62.

*Coles v. Coles*, 18 N. J. Eq. 365. In partition suits the costs of the proceeding, as well as the partition itself, will be charged upon the several shares in proportion to their respective values. *Coles v. Coles*, *supra*.

<sup>2</sup> *Coles v. Coles*, 18 N. J. Eq. 365; *Whitmore v. Whitmore*, 7 Paige, 88. "The costs of partition" for which provision is made by Public Statutes of Rhode Island, chapter 230, section 22, include counsel fees, as well as the ordinary costs of suit and other expenses of making partition. *Re-*

<sup>3</sup> *Gibbs v. Morgan*, 39 N. J. Eq. 78.

<sup>4</sup> *Crandall v. Hoyersadt*, 1 Sandf. Ch. 40.

<sup>5</sup> *Danbury v. Robinson*, 14 N. J. Eq. 824; *Concklin v. Coddington*, 13 N. J. Eq. 250; *Forman v. Bulson*, 30 N. J. Eq. 493; *Massaker v. Mackerly*, 9 N. J. Eq. 440; *Burlew v. Hillman*, 16 N. J. Eq. 23.

<sup>6</sup> *Decker v. Caskey*, 3 N. J. Eq. 446.

<sup>7</sup> *Sharp v. Cutler*, 25 N. J. Eq. 425.

<sup>8</sup> *Concklin v. Coddington*, 13 N. J. Eq. 250.

Where the mortgage debt was legally tendered before the commencement of a foreclosure suit, but the money was not paid into court, it was ordered that defendants have sixty days to pay the debt, and if paid within that time, no costs to be allowed; if not paid, a decree for sale to be rendered, with costs.<sup>1</sup> Ordinarily the purchaser of the equity of redemption would stand in the shoes of the mortgagor, and would be personally liable to so much of the costs as were occasioned by an ill-advised opposition. But where the defense is a reasonable one, he will not be condemned in costs.<sup>2</sup> In suits for foreclosure and sale of mortgaged premises, each mortgagee is entitled to be paid his principal, interest and costs, according to his priority. It is immaterial whether the bill be filed by the first, last, or any intermediate incumbrancer.<sup>3</sup> By the rule and course of practice of the court of chancery in New York, a subsequent incumbrancer was not entitled to his costs until the debt and costs of prior incumbrancers were satisfied.<sup>4</sup> To a foreclosure bill filed by a second mortgagee the first mortgagee was made a party and entered an appearance. Thereupon the second mortgagee amended her bill, attacking the priority of the first mortgage on the ground of fraud. The first mortgagee answered, a replication was filed and testimony taken. The first mortgagee's priority was sustained. It was held that the first mortgagee, who had prevailed, could not be charged with the costs of the litigation incident to his alleged fraud; but that such costs down to the final decree must be borne by the proceeds of the sale. If those proceeds were not sufficient to pay all, then the execution fees should be first paid; then the first mortgagee's claim and all his taxed costs, and finally the second mortgagee's claim and her

<sup>1</sup> *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56.

<sup>2</sup> *Danbury v. Robinson*, 14 N. J. Eq. 824.

<sup>3</sup> *Lithauer v. Royle*, 17 N. J. Eq. 40; *Belchier v. Butler*, 1 Eden, 528; *Uperton v. Harrison*, 7 Sim. 444; *Barnes v. Racster*, 1 Y. & C. (C. C.) 401, 407; *Hepworth v. Heslop*, 8 Hare, 485, 487; *Wilde v. Lockhart*, 10 Beav. 320;

*Carr v. Henderson*, 11 Beav. 415; *Cutfield v. Richards*, 26 Beav. 241; *Langton v. Langton*, 7 De G., M. & G. 80. *Contra*, *Kenebel v. Scrafton*, 18 Ves. 370.

<sup>4</sup> *Farmers' Loan & Trust Co. v. Millard*, 9 Paige, 620; *Boyd v. Dodge*, 10 Paige, 42; *Mayer v. Salisbury*, 1 Barb. Ch. 546; *Smack v. Duncan*, 4 Sandf. Ch. 621.

costs.<sup>1</sup> In a foreclosure suit the costs incurred by the complainant in resisting a motion on the part of the mortgagor to set aside the execution will be ordered paid out of the surplus money in preference to the claim of a purchaser of the mortgaged premises who takes title from the mortgagor after the decree and before the motion to set aside execution.<sup>2</sup> Where a defendant in a bill for foreclosure knowingly sets up an unjust defense and thereby subjects the complainant to extra costs and expense, he may be charged personally with the costs.<sup>3</sup> Where a defendant in a bill of foreclosure, who was not personally liable for the mortgage debt, filed a cross-bill and set up a defense which was not ultimately sustained, and thus kept possession of and received the rents and profits of the mortgaged premises, which premises upon a sale thereof were found insufficient to pay the amount due, he was decreed to pay the extra costs occasioned by his defense.<sup>4</sup> Where on a bill to foreclose a mortgage a subsequent mortgagee or judgment creditor who is made a party defendant answers and disclaims, he is entitled to costs against the plaintiff, to be paid out of the fund if that is sufficient, and if not, to be paid by the plaintiff, the latter not having applied to such defendant before suit brought to release or otherwise disclaim.<sup>5</sup> Where a bill for foreclosure was filed by a second mortgagee, and the first and third mortgagees were made parties, but the latter did not disclaim or offer to release, it was held that the third mortgagee was not entitled to have his costs paid until after the plaintiff was first paid his debt and costs.<sup>6</sup> Where the mortgaged property is insufficient to pay the mortgages, an order cannot be made for allowance of counsel fees of the mortgagor to be paid out of the money in the hands of the receiver.<sup>7</sup>

§ 1019. The same subject continued.— A complainant succeeding in a foreclosure suit cannot recover costs unnecessarily incurred.<sup>8</sup> A suit for foreclosure upon each of two

<sup>1</sup> Scattergood v. Keeley, 40 N. J. Eq. 491.

<sup>2</sup> McPherson v. Housel, 18 N. J. Eq. 399.

<sup>3</sup> Park v. Peck, 1 Paige, 477.

<sup>4</sup> Bank of Plattsburgh v. Platt, 1 Paige, 464.

<sup>5</sup> Catlin v. Harned, 8 Johns. Ch. 61.

<sup>6</sup> Titus v. Velie, 6 Johns. Ch. 435.

<sup>7</sup> Mercantile Trust Co. v. Missouri, K. & T. Ry. Co., 41 Fed. Rep. 8.

<sup>8</sup> Green v. Storm, 8 Sandf. Ch. 305.

mortgages covering the same premises, both of which were in the hands of the complainant when the first bill was filed, is unnecessary and oppressive, and costs will be allowed but in one suit.<sup>1</sup> Costs were denied to a complainant in a foreclosure suit where he acted unreasonably and oppressively in demanding a much larger sum than was legally or equitably due on his mortgage under a threat of immediate prosecution, and when the defendant had been diligent in endeavoring to ascertain the amount from the complainant and his solicitor in order to pay the mortgage debt.<sup>2</sup> A prior mortgagee having by his answer attacked the validity of complainant's mortgage when the protection of his rights required no such defense, his conduct was held vexatious, and costs were denied him out of the estate; and it was held that, in strict equity, he was personally liable for all the extra costs occasioned by his answer.<sup>3</sup> Where a defendant is improperly made a party in a foreclosure suit, the costs of his defense should be paid by the complainant, and should not be charged upon the surplus which belongs to other parties.<sup>4</sup> Where a prior incumbrancer is obliged to appear in a foreclosure suit in order to protect his rights, he is entitled to the necessary costs of his appearance, to be first paid out of the proceeds of the sale under the decree.<sup>5</sup> Where a junior mortgagee files a bill of foreclosure and makes the holder of a prior mortgage a party defendant, and calls for an answer as to the amount due on such prior mortgage, the latter is entitled to his costs, including the expense of his answer to the bill, to be first paid out of the proceeds of the mortgaged premises, or to be charged upon the complainant personally, in the discretion of the court.<sup>6</sup>

**§ 1020. Provisions for attorneys' fees — Federal and State practice.**— The validity of provisions in a mortgage for attorneys' fees in the event of foreclosure, as determined

<sup>1</sup> *Demarest v. Berry*, 16 N. J. Eq. 481.

<sup>2</sup> *Large v. Van Doren*, 14 N. J. Eq. 208.

<sup>3</sup> *Danbury v. Robinson*, 14 N. J. Eq. 824.

<sup>4</sup> *Millaudon v. Brugiere*, 11 Paige, 168.

<sup>5</sup> *Mayer v. Salisbury*, 1 Barb. Ch. 548.

<sup>6</sup> *Boyd v. Dodge*, 10 Paige, 42.

by the Supreme Court of the State in which the question arises, will be followed by the federal courts.<sup>1</sup>

**§ 1021. Costs on bill to redeem.**—As a general rule a party who is permitted to redeem mortgaged premises, whether he is plaintiff or defendant in the suit, must pay the costs of the suit in addition to the amount due on the mortgage;<sup>2</sup> but the mortgagee may by his misconduct forfeit his immunity and be condemned to pay the costs.<sup>3</sup> Upon a bill to redeem, if the mortgagee does not render a correct account, and the mortgagor makes no tender, neither party is entitled to costs.<sup>4</sup> Where the party entitled to redeem offers to pay to the defendant the whole amount equitably due, before he files his bill to redeem, he will not be charged with the defendant's costs.<sup>5</sup> But the mere fact that the defendant refused a tender under an error as to his rights will not make him liable, especially when the mortgagor had failed to pay the debt when due, and had put the mortgagee to expense and inconvenience.<sup>6</sup>

**§ 1022. Costs on bills for account.**—In an injunction bill under a general prayer for relief, an account may be ordered;

<sup>1</sup> *Bendey v. Townsend*, 109 U. S. 665; s. c., 3 S. Ct. Rep. 482; *Dodge v. Tulleys*, 144 U. S. 451; s. c., 12 S. Ct. Rep. 728. Such a provision is invalid in Nebraska. *Dow v. Updike*, 11 Neb. 95; *Hardy v. Miller*, 11 Neb. 395; *Otoe Co. v. Brown*, 16 Neb. 395; *In re Breckinridge*, 31 Neb. 489.

Hence, in *Gray v. Havemeyer* (C. C. A.), 53 Fed. Rep. 174, arising in Nebraska, a decree making such an allowance was modified in that respect.

<sup>2</sup> *Benedict v. Gilman*, 4 Paige, 64; *Lozear v. Shields*, 23 N. J. Eq. 509; *Philips v. Hulsizer*, 20 N. J. Eq. 309; *Vroom v. Ditmas*, 4 Paige, 526; *Slee v. Manhattan Co.*, 1 Paige, 49. Under special circumstances neither party was awarded costs. *Melick v. Creamer*, 25 N. J. Eq. 429.

<sup>3</sup> *Lozear v. Shields*, 23 N. J. Eq. 509; *Vroom v. Ditmas*, 4 Paige, 526; *Slee*

*v. Manhattan Co.*, 1 Paige, 49; *Shuttleworth v. Lowther*, cited in *Detil- lin v. Gale*, 7 Ves. 588; *Mocatta v. Murgatroyd*, 1 P. Wms. 398; *Harvey v. Tebbutt*, 1 J. & W. 197.

<sup>4</sup> *Woodward v. Phillips*, 14 Gray, 182.

<sup>5</sup> *Van Buren v. Olmstead*, 5 Paige, 9. And may be compelled to pay costs. *Hendee v. Howe*, 38 N. J. Eq. 92; *Brockway v. Wells*, 1 Paige, 617.

<sup>6</sup> *Philips v. Hulsizer*, 20 N. J. Eq. 309. Under Massachusetts General Statutes, chapter 103, section 81, the plaintiff on a bill in equity to redeem land from a sale in execution is not entitled to costs unless he makes a tender before filing his bill; nor is the defendant entitled to costs if his defense is groundless. *Sewall v. Sewall*, 180 Mass. 201; *Brown v. South Boston Sav. Bank*, 148 Mass. 300.

but where it does not appear that an account has ever been denied, or even demanded, the complainant must pay the costs.<sup>1</sup> In matters of account the court will frequently apportion the costs between the plaintiff and defendant.<sup>2</sup> Thus where a plaintiff took a decree for an account against an executor who had in his answer stated an account, which was found to be correct, the court gave the costs of the suit up to the decree to the plaintiff, and the costs of the subsequent proceedings to the defendant; the reason for the distinction being that the executor had, before the bill was filed, been applied to for an account, but gave none, and so had rendered the suit necessary; but it was at the plaintiff's own risk that he proceeded with it after the defendant had rendered a correct account by his answer.<sup>3</sup> The plaintiff prayed for an account and specific performance. The defendant did not render an account until ordered by the court. Final judgment was rendered for the defendant. It was held that the plaintiff was not entitled to costs on the ground that the defendant had refused to render an account until ordered, but that the whole matter of costs was one for the discretion of the court.<sup>4</sup> Where a guardian has failed to account as required by law, and sets up a prior account as a bar to accounting, and a decree for an account is made, the complainant will be allowed costs up to the decree.<sup>5</sup> Where upon a bill filed for a statement of partnership accounts it appeared that each party had made claims against the other before and during the progress of the suit, which were not sustained by the decree, it was held that neither party was entitled to the general costs of the cause as against the other.<sup>6</sup> In a suit brought by a *cestui que trust* against his trustees for an account, etc., no costs were allowed to the plaintiff, the conduct of the defendants being fair and honest and the allegations of misconduct unfounded.<sup>7</sup>

§ 1023. Costs on bills for specific performance.— Where, for frivolous reasons, the vendor refuses to execute a convey-

<sup>1</sup>Conover v. Walling, 28 N. J. Eq. 338.

<sup>4</sup>Morris v. Peckham, 51 Conn. 129.

<sup>5</sup>Burnham v. Dalling, 16 N. J. Eq.

<sup>2</sup>3 Daniell's Ch. Pr. (5th ed.) 1408. 310.

See Burnham v. Dalling, 16 N. J. Eq. 310.

<sup>6</sup>Caldwell v. Leiber, 7 Paige, 488.

<sup>7</sup>Smith v. Smith, 4 Johns. Ch. 445.

<sup>3</sup>Anon., 4 Mad. 278.



ance, he will not be allowed costs in an action to compel specific performance, though there be a good reason for refusing to execute the conveyance as demanded by the vendee.<sup>1</sup> Where a bill for specific performance of an agreement was necessary by a trustee refusing to join in the conveyance, the plaintiff was directed to pay to the other defendants all their costs of the suit and recover them over, together with his own costs, from the defendant, the trustee.<sup>2</sup> Where a suit for specific performance is rendered necessary by the act of God, such as the lunacy of the vendor or his dying intestate, the decree is generally made without costs.<sup>3</sup> Where a purchaser brings his bill for a conveyance of land when he ought to have tendered but has failed to tender the purchase-money, he will be entitled to a conveyance on the payment of the purchase-money, but will be decreed to pay all costs.<sup>4</sup> Where a vendor, defendant in a bill for specific performance, was ordered to convey, the vendee was allowed to set off the costs of the suit against the balance of the consideration money.<sup>5</sup> Where, in a bill for a specific performance of a contract for the sale of land, the complainant insisted upon the defendant taking two acres more than he was bound to take, and the defendant declined paying interest, which the complainant was entitled to, neither party was allowed costs.<sup>6</sup>

§ 1024. Costs on bills of discovery.—As a general rule a party who has fully answered a bill of discovery is entitled to his costs,<sup>7</sup> and of course where the charges in the bill are denied.<sup>8</sup> An exception to the rule is recognized where the complainant shows that he has applied to the defendant to admit

<sup>1</sup> *Abraham v. Stewart*, 88 Mich. 7.

<sup>2</sup> *Jones v. Lewis*, 1 Cox, 199.

<sup>3</sup> *Cresswell v. Haines*, 8 Jur. (N. S.) 208; *Hanson v. Lake*, 2 Y. & C. (C. C.) 328; *Hindes v. Streeten*, 10 Hare, 18; *Purser v. Darby*, 4 K. & J. 44; *Scott v. Scott*, 11 W. R. 766.

<sup>4</sup> *Lee v. Bickley*, 6 Litt. 290.

<sup>5</sup> *Van Ranst v. Parcells*, 3 Edw. Ch. 600.

<sup>6</sup> *Knickerbocker v. Harris*, 1 Paige, 210.

<sup>7</sup> *Burnett v. Sanders*, 4 Johns. Ch.

508; *King v. Clark*, 3 Paige, 76; *Deas v. Harvie*, 2 Barb. Ch. 448. But not where the bill is for discovery and relief. *McDougall v. Miln*, 2 Paige, 325. Executors complainant are not exempt from this rule, where the defendant's answer shows that no fact within his knowledge could have aided them. *Boughton v. Philips*, 6 Paige, 384; *Williams v. Harden*, 1 Barb. Ch. 293.

<sup>8</sup> *King v. Clark*, 3 Paige, 76; *Boughton v. Philips*, 6 Paige, 384.

some fact material to the defense of the complainant in the suit at law, which the defendant refuses to admit, but which he afterwards admits by his answer to the bill.<sup>1</sup> Where an officer of a corporation is necessarily made a defendant for the purpose of discovery merely, if the complainant is compelled to pay the costs of such discovery he may have a decree over against the other parties for such costs.<sup>2</sup>

**§ 1025. Costs on feigned issues.**—The costs of an issue at law directed by a court of equity do not follow the verdict as of course, but are in the discretion of the court.<sup>3</sup> They are not usually disposed of until the further hearing of the cause.<sup>4</sup> But if the issue was directed on an interlocutory application they may be disposed of previously.<sup>5</sup> An application for the costs occasioned by the plaintiff in the issue not proceeding to trial should be made to the court awarding the issue.<sup>6</sup>

**§ 1026. Costs of papers unnecessarily voluminous.**—Papers unnecessarily voluminous, though actually made, will not be allowed for upon taxation, except for so much as was necessary to be incorporated in the papers. Charges for useless folios will be rejected.<sup>7</sup> Where the volume of evidence taken before a master is swelled by testimony taken by the prevailing party, which is unimportant or irrelevant, or taken with needless prolixity, the court in awarding costs in his favor will disallow the costs and expenses of taking and printing such testimony.<sup>8</sup> Costs of printing a volume of three hun-

<sup>1</sup> *Deas v. Harvie*, 2 Barb. Ch. 448; trial will generally be directed to follow the costs of the new trial. 2 *King v. Clark*, 3 Paige, 76; *Burnett v. Sanders*, 4 Johns. Ch. 508; *Harris v. Williams*, 10 Paige, 108. *Daniell's Ch. Pr.* (5th ed.) 1189.

<sup>2</sup> *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige, 127. <sup>4</sup> *Standen v. Edwards*, 1 Ves. Jr. 188, 185; *Boyse v. Colclough*, 1 K. & J. 124, 144.

<sup>3</sup> *Decker v. Caskey*, 3 N. J. Eq. 446; *Corporation of Rochester v. Lee*, 2 De G., M. & G. 427, 481; *Stacey v. Spratley*, 4 De G. & J. 199; 2 *Daniell's Ch. Pr.* (5th ed.) 1148. They are generally given to the successful party. *Carpenter v. Eastern & Amboy R. Co.*, 28 N. J. Eq. 890. And the costs of an application for a new <sup>5</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1148; *Duncan v. Varty*, 2 Phil. 696; *Rigby v. Great Western Ry. Co.*, 14 Jur. 710, 712.

<sup>6</sup> *Anon.*, 2 P. Wms. 68.

<sup>7</sup> *Adams v. Stevens*, *Clarke's Ch.* 586.

<sup>8</sup> *Yard v. Ocean Beach Association*, 49 N. J. Eq. 806.

dred pages of testimony, nine-tenths of which consisted of matters entirely irrelevant to the issue, were not allowed to either party as against the other.<sup>1</sup> Upon special motions and petitions, if the papers on which the application is made or based are unnecessarily prolix or voluminous, costs will be refused to the party using such improper papers, although he otherwise might have been entitled to costs against the adverse party.<sup>2</sup>

**§ 1027. Costs on exceptions to answers.**—Where exceptions are taken to an answer, some of which are allowed and others disallowed, and the defendant excepts to so much of the master's report as allowed a part of the exceptions to the answer, and on the hearing before the court the master's report is confirmed, the complainant is entitled to the costs of the hearing and also of the reference and of those exceptions to the answer which are allowed by the master, and the defendant is not entitled to the costs of the exceptions disallowed by the master.<sup>3</sup> Costs on exceptions to an answer, like costs in all other cases in chancery, are subject to the discretion of the court. But the general rule is that if the defendant submits to the exception the plaintiff has his costs; and if they be referred to a master the plaintiff shall have costs on the exceptions allowed, and the defendant has costs on the exceptions disallowed, and the balance struck is to be paid.<sup>4</sup> If some of the exceptions are disallowed and none of them are allowed in full, the defendant is entitled to his costs on the reference.<sup>5</sup>

**§ 1028. Solicitor's costs — Remedy.**—The whole bill of costs belongs primarily to the successful party and not to his attorney.<sup>6</sup> The court of chancery has no general jurisdiction over its suitors to compel them to pay costs due to their solicitors or counsel.<sup>7</sup> If the solicitor has no money of the client in his

<sup>1</sup> *Ruckman v. Ruckman*, 38 N. J. Eq. 855, where the court said "the taking of such testimony is an onerous tax upon litigants and the reading of it an imposition on the court."

<sup>2</sup> *Seebor v. Hess*, 5 Paige, 85.

<sup>3</sup> *Richards v. Barlow*, 1 Paige, 188.

<sup>4</sup> *M. E. Church v. Jaques*, 1 Johns. Ch. 65; *Richards v. Barlow*, 1 Paige, 323.

<sup>5</sup> *Richards v. Barlow*, 1 Paige, 323.

<sup>6</sup> *Celluloid Mfg. Co. v. Chandler* (Mass.), 27 Fed. Rep. 9.

<sup>7</sup> *Lorillard v. Robinson*, 2 Paige,

hands, and there is no fund in court on which he has a lien for costs, he may go before the proper taxing officers and get his costs taxed, and then proceed at law thereon, or he may bring his suit without taxation, at his election, leaving the client to make an application on his part if he wishes a taxation of the costs.<sup>1</sup> Where the parties to a suit make a collusive settlement thereof before a decree for the purpose of defrauding the solicitor of his costs, his remedy is to proceed with the suit in the name of his client notwithstanding the collusive settlement.<sup>2</sup>

**§ 1029. Modification of decree for costs.**—The discretion of the chancellor in the imposition of costs is exercised and exhausted when a decree for the payment of costs is embodied in a final decree settling the equities of the case and defining and declaring the rights of the parties. In the execution of the decree and as to matters subsequently arising, a further consideration of the cause may be and is usually necessary in the court of chancery; but upon such consideration, the term of the court at which the decree was passed and entered having expired, it is not within the competency of the court, upon mere motion, to vary or impugn in any material respect the original decree.<sup>3</sup> Clerical errors or omissions may be corrected,<sup>4</sup> but the sentence of the court, that which has been deliberately ordered and adjudged, cannot be varied.<sup>5</sup> And this is as true in reference to the decree for costs as to any other part of the decree, though as to their imposition the court had originally a discretion. The discretion has been exercised and cannot be recalled without rendering it uncertain when there will be a final sentence disposing of them.<sup>6</sup>

**§ 1030. Enforcement of bond of interveners.**—Where persons were permitted to intervene in a suit as grantees of a

276. See, also, *In re Southwick*, 1 Johns. Ch. 22.

<sup>1</sup> *Lorillard v. Robinson*, 2 Paige, 276.

<sup>2</sup> *Talcott v. Bronson*, 4 Paige, 501.

<sup>3</sup> *Ex parte Robinson*, 72 Ala. 389, 391; 2 Daniell's Ch. Pr. 1371.

<sup>4</sup> §§ 831, 850, *supra*.

<sup>5</sup> §§ 850, 851, *supra*.

<sup>6</sup> *Ex parte Robinson*, 72 Ala. 389.

If a final decree is silent as to costs they are lost and cannot afterwards be ordered to be paid unless on a rehearing the decree has been opened for that purpose. *Travis v. Waters*, 1 Johns. Ch. 85.

party by giving bond to pay the costs, the court, upon motion after an adverse decree, may estreat the bonds and order judgment to be entered, and proper process of attachment to issue against all the obligors and sureties.<sup>1</sup>

**§ 1031. When security for costs may be required.**—In order to prevent the defendant or respondent in the case of a petition from being defeated of his right to costs, it is an ancient and well-established rule, which does not rest upon statutory provisions,<sup>2</sup> that if the plaintiff,<sup>3</sup> or his next friend,<sup>4</sup> or the petitioner,<sup>5</sup> if he is not a party to the cause,<sup>6</sup> is resident abroad, or if he goes abroad to reside after the commencement of the suit,<sup>7</sup> the court will, on the application of the defendant or respondent, order him to give security for the costs and in the meantime direct all proceedings to be stayed,<sup>8</sup>

<sup>1</sup> *Craig v. Leitensdorfer*, 127 U. S. 764. The court said that it was a new question, but that it was "its duty to enforce payment without remitting the payees in these bonds to another suit in another court."

<sup>2</sup> *Newman v. Landrine*, 14 N. J. Eq. 291, 292; *Binns v. Mount*, 28 N. J. Eq. 24, 25. In the case last cited it was held that the considerations which induce the court to require a complainant who is resident abroad to give security for costs would justify an order requiring a non-resident vendee of lands filing a bill for specific performance of the agreement to convey the lands to him to pay into court the consideration that was to have been paid at the time of the execution of the deed, though he was not in possession.

<sup>3</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 27. It was held by Chancellor Kent in a case where an administrator was plaintiff that one who sues *en autre droit* ought not to be obliged to give security for costs. *Goodrich v. Pendleton*, 8 Johns. Ch. 520. See, also, *Cathcart v. Hewson*, 1 Hayes, 173. *Contra*, *Knight v. De Blaquiére*, Sau.

& S. 648; *Murfree v. Leeper*, 1 Overton, 1. It was said by Justice Story in *Woodworth v. Sherman*, 1 Story, 171, that in the Massachusetts circuit the plaintiff in patent cases had never been required to give any security for costs. *Woodworth v. Sherman*, 1 Story, 171, 173.

<sup>4</sup> *Kerr v. Gillespie*, 7 Beav. 269; *Watts v. Kelly*, 6 W. R. 206.

<sup>5</sup> *Drever v. Mandesley*, 5 Russ. 11; *Ex parte Seidler*, 12 Sim. 106; *Re Norman*, 11 Beav. 401; *Atkins v. Cook*, 3 Drew, 694; *Partington v. Reynolds*, 6 W. R. 307.

<sup>6</sup> *Cochrane v. Fearon*, 18 Jur. 568.

<sup>7</sup> *Newman v. Landrine*, 14 N. J. Eq. 291; *Anon.* 2 Dick. 776; *Weeks v. Cole*, 14 Ves. 517; *Dyott v. Dyott*, 1 Mad. 187; *Edwards v. Burke*, 9 L. T. (N. S.) 406.

<sup>8</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 27; *Fox v. Blew*, 5 Mad. 147; *Lillie v. Lillie*, 2 M. & K. 404; *Lantour v. Holcombe*, 1 Phil. 262, 264. As to staying suits until the costs of a former suit are paid, see § 606, *supra*. It is a sufficient residence abroad to bring the plaintiff within the rule requiring security if he is absent or has

and in default of plaintiff giving security when ordered the bill should be dismissed.<sup>1</sup> The general rule applies when the plaintiff is a foreign government.<sup>2</sup> Where a plaintiff appears to have no permanent residence he will be made to give security for costs.<sup>3</sup> A defendant who has obtained the conduct of the cause has been required to give security.<sup>4</sup> The plaintiff in a cross-bill cannot, in general, be called upon to give security for costs to the plaintiff in the original suit, the cross-bill being only a portion of the defense to the original bill;<sup>5</sup> but his co-defendants to the cross-bill may move for such security against their plaintiff.<sup>6</sup> And it has been held that a bill to restrain an action at common law is so far a defensive proceeding as to exempt the plaintiff in equity from the liability to give security for costs.<sup>7</sup> If subsequently to the order directing security for costs to be given the plaintiff becomes resident within the jurisdiction, he may apply to have the order discharged, but he must pay the costs of the applica-

departed under such circumstances that there is no probability of his being forthcoming when the defendant may be entitled to call upon him to pay costs. *Blakeney v. Dufaur*, 16 Beav. 292; 1 *Daniell's Ch. Pr.* (5th ed.) 29. See, also, *Kennaway v. Tripp*, 11 Beav. 588; *Drummond v. Tillinghurst*, 15 Jur. 884; *Foss v. Wagner*, 2 Dowl. P. C. 499; *Wright v. Black*, 2 Wend. 258; *Gilbert v. Gilbert*, 2 Paige, 608. A mere intention to go abroad is not sufficient. *Adams v. Colthurst*, 3 Anst. 552; *Willis v. Garbutt*, 1 Y. & J. 511; *Hoby v. Hitchcock*, 5 Ves. 699. See *Seilaz v. Hanson*, 5 Ves. 261.

<sup>1</sup> *Carnac v. Grant*, 1 Sim. 348; *Massey v. Gillelan*, 1 Paige, 644; *Breeding v. Finley*, 1 Dana, 477; *Bridges v. Canfield*, 3 Edw. Ch. 217. Where a non-resident complainant gives security for costs and one of the sureties becomes insolvent a new one must be added and proceedings stayed until it is done. *Bridges v. Canfield*, 3 Edw. Ch. 208. Where a plaintiff has recovered judgment

against a solvent defendant and process is outstanding in the nature of an execution to collect the same, it is not proper to require the plaintiff to make a deposit to secure costs due to a commissioner. *United States v. St. Charles Co.*, 81 Fed. Rep. 442. A non-resident complainant must give security for costs notwithstanding the solicitor's liability by rule of court. *Baldwin v. Williamson*, Hopk. Ch. 117.

<sup>2</sup> *Republic of Costa Rica v. Erlanger*, 3 Ch. Div. 62.

<sup>3</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 27; *Bailey v. Gundry*, 1 Keen, 53; *Player v. Anderson*, 15 Sim. 104.

<sup>4</sup> *Mynn v. Hart*, 9 Jur. 860.

<sup>5</sup> *Vincent v. Hunter*, 5 Hare, 820; *M'Gregor v. Shaw*, 2 De G. & S. 860; *Sloggett v. Viant*, 18 Sim. 187; *Wild v. Murray*, 18 Jur. 892; *Tynte v. Hodge*, 3 J. & H. 692; *Washoe Mining Co. v. Ferguson*, L. R. 2 Eq. 371.

<sup>6</sup> *Sloggett v. Viant*, 18 Sim. 187.

<sup>7</sup> *Watteau v. Billam*, 3 De G. & S. 516; *Williamson v. Lewis*, 3 Giff. 394.

tion.<sup>1</sup> Where the defendant has obtained an order for security which has not been complied with he should not move to dismiss the bill for want of prosecution, but that, unless security is given within a limited time, the bill may be dismissed.<sup>2</sup>

**§ 1032. Security from non-resident co-plaintiff.**—A complainant who is a non-resident will not be required to give security for costs if he is joined with a resident complainant.<sup>3</sup> The reason given by Lord Eldon for the rule was that where one of the complainants is within the jurisdiction, as each is bound for the whole costs, the defendant has security; and where there were two complainants, one resident within the jurisdiction and the other not, and an order for security was

<sup>1</sup> *O'Connor v. Sierra Nevada Co.*, 24 Beav. 435; *Mathews v. Chichester*, 30 Beav. 135.

<sup>2</sup> *Kennedy v. Edwards*, 11 Jur. (N. S.) 153. Thirty days' time was given in *Bridges v. Canfield*, 2 Edw. Ch. 217.

<sup>3</sup> *Jones v. Knauss*, 33 N. J. Eq. 188, where the court said, "the practice seems to be settled against the defendant's right to security in such a case," citing 1 *Hoffman's Ch. Pr.* 204; 1 *Daniell's Ch. Pr.* 28; 1 *Smith's Ch. Pr.* 555; *Winthrop v. Royal Ass. Co.*, 1 Dick. 232; *Walker v. Easterby*, 6 Ves. 612. See, also, the following cases cited in a note by the learned reporter (33 N. J. Eq. 189): *Anon.*, 7 Taunt. 307; *Anon.*, 2 Cr. & Jer. 88; *Bowden v. Roe*, 1 Hodges, 315; *Thomel v. Roelants*, 2 C. B. 290; *Jemison's Case*, 31 Ala. 392; *Thalman v. Barbour*, 5 Ind. 178; *Zimmerman v. Mendenhall*, 2 Miles, 402; *Mayer v. Tyson*, 1 Bland, 564; and citing to the proposition that the rule applies even where the resident party is insolvent, *McConnell v. Johnston*, 1 East, 431; *Reddick v. Sinnott*, 1 Hud. & Bro. 204; *Peterson v. Smith*, 10 N. J. Law, 192; *Pfister v. Gillespie*, 2 Johns. Cas. 109; *Ten*

*Broeck v. Reynolds*, 18 How. Pr. 462. See *Wood v. Goss*, 24 Ill. 626. And that the rule applies where a suit is brought in the name of a non-resident plaintiff for the benefit or use of a resident. *Yonde v. Yonde*, 3 A. & E. 311; *Seward v. Wilson*, 1 Scam. 192. But see *Lewis v. Lewis*, 25 Ala. 315; *Bush's Case*, 29 Ala. 50; *Cotton v. Harmon*, 1 Scam. 581; *O'Connell v. Rea*, 51 Ill. 306. But not where the suit is brought by a non-resident plaintiff for the benefit or use of a resident. *Buckmaster v. Beames*, 8 Ill. 1; *Smith v. Rosseter*, 11 Ill. 119; *Ingles v. Hume*, 3 B. Mon. 33; *Palmer v. Hicks*, 17 Ark. 505. But see *Charles v. Waterman*, 2 How. Pr. 122; *Morgan v. Hale*, 12 West Va. 713; *Gookin v. Upham*, 22 N. H. 38; *Burker v. Hutchinson*, 7 Ir. Eq. 508; *Swift v. Collins*, 1 Denio, 659. And that a foreign corporation must give bond for costs, although many of its members are residents, *Limerick R. Co. v. Fraser*, 4 Bing. 394; *Ross v. Hawey*, 32 Ga. 388. See *Mechanics' Bank v. Goodwin*, 14 N. J. Law, 439; *Washington R. Co. v. Alexandria R. Co.*, 19 Gratt. 592; *Bank v. Jessup*, 19 Wend. 10; *Republic v. Erlanger*, L. R. 3 Ch. Div. 62.

obtained *ex parte*, and subsequently a motion was made to discharge it on the ground that it had been improperly granted, Lord Eldon discharged it, but without costs.<sup>1</sup>

**§ 1033. Security from non-resident of the district.**— A complainant non-resident of the judicial district in which the suit is brought may be required to give security for costs.<sup>2</sup>

**§ 1034. Security for costs on bill of interpleader.**— While a party who is actually the defendant may require security for costs, although nominally he is plaintiff, yet where he is actually as well as nominally the plaintiff, as, for instance, the

<sup>1</sup> Walker v. Easterby, 6 Ves. 612. Under the same circumstances the order was discharged in Jones v. Knauss, 33 N. J. Eq. 188. But the rule does not apply where a husband who has no substantial interest is co-plaintiff with his wife. Smith v. Etches, 1 H. & M. 711.

<sup>2</sup> Lyman Ventilating and Refrigerator Co. v. Southard, 12 Blatchf. 405. In that case the plaintiff was a New York corporation held to be a resident of the southern district of New York by reason of having its principal office in that district, and the suit was brought in the circuit court for the northern district of New York. Judge Wallace said:— "It is urged, however, against the motion, that by force of section 985 of the Revised Statutes of the United States (Act of May 20, 1826, 4 U. S. Stat. at L. 184), by which writs of execution upon judgments or decrees obtained in a circuit court of the United States, in any State which is divided into two or more districts, may run and be executed in any part of such State, any decree which may be obtained against the complainant can be enforced in that district; and it cannot be said, therefore, that it resides beyond the jurisdiction of the court, within the meaning of the rule.

The same argument was held untenable at a very early day by the High Court of Chancery in England, where a rule similar to the one under consideration prevailed, requiring security for costs on the part of complainants residing out of the jurisdiction; and it was held that a plaintiff resident in Ireland must give security notwithstanding the act of 41 George III., by which an attachment could issue to Ireland to enforce there any order or decree made by the English court of chancery. Mullett v. Christmas, 2 Ball & B. 423; Ker v. Duchess of Munster, Bunb. 85; Hill v. Reardon, 6 Madd. 46. A similar conclusion was reached in the courts of [New York], where a plaintiff residing in Brooklyn was required to give security for costs under the Revised Statutes in an action in the superior court of New York city, notwithstanding the statute by which judgments of that court could be enforced in any part of the State. Gardner v. Kelly, 2 Sandf. 832; Bolton v. Taylor, 18 Abb. Pr. 385. These decisions must be held decisive in the present case." The provisions of the Revised Statutes of New York relative to security for costs had been adopted by the United States circuit court in that circuit.



claimant in an interpleader issue upon whom rests the burden of proof, he is not entitled to security for costs.<sup>1</sup> So it has been held that a defendant to a bill of interpleader who is out of the jurisdiction may be required to give security for costs.<sup>2</sup> And it was recently decided in the city court of New York that a third person substituted as defendant by order of interpleader cannot be required to give security for costs as a condition of being allowed to prosecute his claim to the fund, although a non-resident and irresponsible, in the absence of a statute requiring such security.<sup>3</sup>

§ 1035. Who may be a surety.—It is irregular for the complainant's solicitor to be surety for the complainant.<sup>4</sup> The bond of an incorporated society has been held sufficient.<sup>5</sup>

§ 1036. Amount of security required.—Where a rule requiring security for costs does not mention the extent of the security the amount is left to the discretion of the court.<sup>6</sup> The old rule in the English court of chancery, where the plaintiff lived abroad, was to require security in the sum of £40.<sup>7</sup> But Lord Hardwicke said it was too low, and the court frequently increased it upon terms, in one case from £40 to £800. Although a rule of court makes a solicitor liable for

<sup>1</sup> Gross & Phillips Mfg. Co. v. Gerhard, 8 Reporter, 186.

<sup>2</sup> Lyne v. Pennell, 1 Sim. (N. S.) 113; Smith v. Hammond, 6 Sim. 10, 15.

<sup>3</sup> McHugh v. Astrophe, 20 N. Y. Supl. 877, 878, where Ehrlich, C. J., said:—"The substituted defendant comes in as a claimant, and in respect to such claim is nominally, though not technically, a plaintiff. He is a non-resident and irresponsible. Under such circumstances, the imposition of the condition might be deemed a valid exercise of power. But the difficulty is that there is no statute requiring such substituted defendant to give security for costs. See Republic of Honduras v. Soto, 112 N. Y. 318; Coates v. Morris, 1 N. Y. Law Bul. 29. If the third party

had applied for leave to come in, security might have been required as a condition. But that is not the case. He is brought into the litigation *in invitum* and cannot be hampered by conditions."

<sup>4</sup> Panton v. Labertouche, 1 Phill. 265. *Contra*, Micklethwaite v. Rhodes, 4 Sandf. Ch. 484.

<sup>5</sup> Plestow v. Johnson, 1 Sm. & G. App. 20.

<sup>6</sup> Long v. Tardy, 1 Johns. Ch. 202.

<sup>7</sup> Long v. Tardy, 1 Johns. Ch. 202, 208.

<sup>8</sup> Gage v. Lady Stafford, 2 Ves. 556. Order XI, 6, in the English chancery, increased the amount to £100. The order applied to the case of a plaintiff within the jurisdiction ordered to give security. Bailey v. Gundry, 1

costs to a certain amount if he proceeds in behalf of a non-resident without filing security, the defendant is not bound to accept of the solicitor's security under the rule. He is entitled to further and adequate security.<sup>1</sup> Where the complainant in a bill filed in the New York court of chancery for an account of partnership transactions was a resident of France, he was required upon due application to give a bond with one sufficient person in the sum of \$750.<sup>2</sup>

**§ 1037. Order for security — Application and affidavit.**—Where it appears on the bill or petition that the plaintiff is resident out of the jurisdiction, an order to obtain security for costs is obtained on motion of course.<sup>3</sup> In other cases a special application must be made.<sup>4</sup> "When proceedings have been commenced the defendant has a right to make personal demand on the plaintiff's attorney for security for costs, and may refuse to go on until this has been put in. After a cause is at issue on the docket, heard in part, security for costs cannot be had but by an order of court upon notice."<sup>5</sup> Where the plaintiff removes abroad after filing the bill the defendant's application should be supported by affidavit that the plaintiff has not merely departed but has gone to settle abroad,<sup>6</sup> and that the defendant did not know of the removal before taking the last step in the cause.<sup>7</sup> Where there is nothing on all the papers in the case to show that the complainant is a non-resident, the defendant's motion for security for costs on the ground that he is such will be denied.<sup>8</sup> Where a defendant, after serving a petition for security for costs, and

Keen, 58. In New York the penalty of the bond was required to be at least \$250; but the court in a proper case might enlarge it, and might either fix the amount itself or refer it to a master. 2 R. S. N. Y. 620, § 4; *Fulton v. Roosevelt*, 1 Paige, 179; *Massey v. Gillelan*, 1 Paige, 644; *Gilbert v. Gilbert*, 2 Paige, 608.

<sup>1</sup> *Long v. Tardy*, 1 Johns. Ch. 202.

<sup>2</sup> *Long v. Tardy*, 1 Johns. Ch. 202. In *Stewart v. The Sun*, 36 Fed. Rep. 307, security was required in the sum of \$500.

<sup>3</sup> *Wyllie v. Ellice*, 11 Beav. 99.

<sup>4</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 83; *Tynte v. Hodge*, 2 J. & H. 692. The residence of the complainant should be stated in his bill, and if it is not stated the defendant may apply to the court and obtain an order that the complainant give security for costs. *Howe v. Harvey*, 8 Paige, 78.

<sup>5</sup> *Prince v. Towns*, 33 Fed. Rep. 161.

<sup>6</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 81.

<sup>7</sup> *Newman v. Landrine*, 14 N. J. Eq. 291.

<sup>8</sup> *Holt v. Winters*, 30 Fed. Rep. 22.

before the day on which he proposes to move, receives notice that security has been filed with a copy of the surety's affidavit of justification, he should countermand his petition; if he persists in moving he will be charged with costs.<sup>1</sup>

**§ 1038. Service of order staying suit — Notice of security given.**—An order staying a suit until the complainant has given security for costs is not effectual until it has been served.<sup>2</sup> By the English practice and by the practice in New Jersey a complainant whose suit has been stayed by order until he files security for his costs does not relieve himself from the stay so as to put the defendant in default for not pleading by simply filing security; but to place the defendant in a position where time will run against him, the complainant must, in addition to filing the security, give notice that security has been filed.<sup>3</sup> The notice should also be given to the defendants other than the one who has called for security.<sup>4</sup>

**§ 1039. Waiver of security.**—“A defendant, in case his adversary is non-resident, has an unquestionable right to security for costs; but inasmuch as it is a right which may be used to delay or obstruct justice, he should be required to insist upon it promptly and to adhere to it persistently, or otherwise be held to have lost it.”<sup>5</sup> The rule is perfectly well settled that if a defendant takes any step in a cause after he has notice that the complainant is a non-resident, he waives his right to security for costs.<sup>6</sup> One defendant may, however,

<sup>1</sup> *Micklethwaite v. Rhodes*, 4 Sandf. Ch. 484.

<sup>2</sup> *Southern Nat. Bank v. Darling*, 49 N. J. Eq. 389, 401.

<sup>3</sup> *Braithwaite's Pr.* 584; 1 *Daniell's Ch. Pr.* 34; *Southern Nat. Bank v. Darling*, 49 N. J. Eq. 398.

<sup>4</sup> *Southern Nat. Bank v. Darling*, 49 N. J. Eq. 398.

<sup>5</sup> Per Vice-Chancellor Van Fleet, in *Shuttleworth v. Dunlop*, 84 N. J. Eq. 488, 498, declaring, further, that “a proper regard for the rights growing out of an enlightened comity requires the courts of this State to treat the citizens of other States or nations

who appeal to them for justice against our own citizens with considerate liberality.”

<sup>6</sup> Per Vice-Chancellor Van Fleet, in *Shuttleworth v. Dunlop*, 84 N. J. Eq. 488, 492, citing 1 *Daniell's Ch. Pr.* 30; *Anon.*, 10 Ves. 287. *Kinderly, V.-C.*, in *Atkins v. Cooke*, 8 Jur. (N. S.) 288 (the case is also reported in 3 *Drew.* 694), said that the *least* step is a waiver. *Mason v. Gardner*, 3 Bro. C. C. 609, notes; *Meliorucchy v. Meliorucchy*, 2 Ves. Sr. 24; s. c., 1 *Dick.* 147; *Craig v. Bolton*, 2 Bro. C. C. 609; *Foster v. Swasey*, 2 W. & M. 217; *Anon.*, 10 Ves. 287; *Prince*

be entitled to security for costs although a co-defendant has taken steps which constitute a waiver of his own right to security.<sup>1</sup> Where the right to require security for costs has been waived, it was held not to preclude the defendant from requiring security from the representative of the original plaintiff, by whom on the death of the plaintiff the suit was revived, and who was also out of the jurisdiction.<sup>2</sup>

§ 1040. **The same subject continued.**— The same rule of waiver applies where a complainant is a resident at the time of instituting the suit, but subsequently removes from the State; and if the defendant takes any step in the cause after knowledge that the complainant has ceased to be a resident he cannot demand security for costs.<sup>3</sup> In such a case it was

*v. Towns*, 38 Fed. Rep. 161. See, also, *Swanzy v. Swanzy*, 4 K. & J. 287; *Murrow v. Wilson*, 12 Beav. 497; *Cooper v. Purton*, 8 W. R. 702; *Long v. Tottenham*, 1 Ir. Ch. Rep. 127; *Carpenter v. Aldrich*, 8 Met. 58. The rule is stated by Daniell that if the defendant "takes any material step after he has notice, he cannot then apply." It was held in one case that the federal courts may require security for costs from the solvent non-resident complainants at any time when no prejudice to complainants' rights is shown to have resulted from the defendants' delay in moving. *Stewart v. The Sun*, 86 Fed. Rep. 307, where Lacombe, J., said:—"The State courts which refuse to require security for costs from a non-resident plaintiff, where defendant has delayed in answering until after answer is filed, also hold that impecunious non-residents may not sue in *forma pauperis*. In this court such plaintiffs are not allowed this privilege; and an equitable application of the doctrine of *Heckman v. Mackey*, 82 Fed. Rep. 574, would seem to warrant the court in requiring security from solvent, non-

resident plaintiffs at any time—at least when no special prejudice to plaintiff's rights is shown to have resulted from defendant's delay in moving." A motion for security for costs which is in effect an application for security as to extraordinary disbursements growing out of an order of reference, and which were not in contemplation of either party at an earlier stage of the case, will not be denied on the ground of delay because not made until after the entry of the order of reference. *Uhle v. Burnham*, 46 Fed. Rep. 500, holding that the granting of such a motion at this stage of the case is within the discretion of the court, and citing *Hugunin v. Thatcher*, 18 Fed. Rep. 105; *Stewart v. The Sun*, 86 Fed. Rep. 307.

<sup>1</sup> *Long v. Tardy*, 1 Johns. Ch. 202.

<sup>2</sup> *Jackson v. Davenport*, 29 Beav. 212.

<sup>3</sup> *Newman v. Landrine*, 14 N. J. Eq. 291. The motion was denied, "costs to abide the event of the suit." See, also, *Meliorucchy v. Meliorucchy*, 2 Ves. Sr. 24; *Craig v. Bolton*, 2 Bro. C. C. 609; *Dyott v. Dyott*, 1 Mad. 187; *Prior v. White*, 2 Molloy, 861.

held that obtaining an order extending the rule for closing testimony was a waiver.<sup>1</sup> The defendant's knowledge of the complainant's removal from the State may be proved by circumstances,<sup>2</sup> or it may appear upon the face of an interlocutory application in the cause.<sup>3</sup> Where circumstances appear tending to show that the defendant had notice of the change of residence, his affidavit in reply to an answer to his motion to dismiss the bill for failing to obey an order requiring security should contain a full and explicit denial of notice at the time of taking the last order in the cause. Where the denial consisted of a mere statement that he supposed that the complainant was a resident of the State "until a short time since," it was held insufficient.<sup>4</sup>

**§ 1041. What constitutes a waiver — Illustrations.**— If a defendant, after he has notice that a plaintiff is a non-resident, asks for the continuance of a motion for the appointment of a receiver and afterwards proceeds to a hearing on it, without objection, and procures its denial, he waives his security for costs.<sup>5</sup> Where a defendant demurred to a part of the bill it was held to constitute a waiver.<sup>6</sup> When a suit has been once heard on issue joined, and is opened for a further hearing, on an amended answer, only as a matter of favor, it is too late to move for security for costs on the ground of non-residence of the plaintiff, the fact appearing on the face of the bill.<sup>7</sup> Where the non-residence of the plaintiff appeared on the face of the bill and the defendant put in a plea of the statute of limitations, which was argued and over-

<sup>1</sup> *Newman v. Landrine*, 14 N. J. Eq. 291.

<sup>2</sup> *Newman v. Landrine*, 14 N. J. Eq. 291, 293.

<sup>3</sup> *Shuttleworth v. Dunlop*, 84 N. J. Eq. 488, 490.

<sup>4</sup> *Newman v. Landrine*, 14 N. J. Eq. 291, 293.

<sup>5</sup> *Shuttleworth v. Dunlop*, 84 N. J. Eq. 488.

"The rule is that he must apply before answer, and at the first opportunity, when the fact of non-residence appears upon the face of

the bill; and if he does not, he must then apply as soon as the fact comes to his knowledge, which may be in any subsequent stage of the suit. *Meliorucchy v. Meliorucchy*, 2 Ves. 24." Per Chancellor Kent in *Long v. Tardy*, 1 Johns. Ch. 202, 203.

<sup>6</sup> *Long v. Tardy*, 1 Johns. Ch. 202. But see *Watteu v. Billam*, 3 De G. & S. 516; *Micklethwaite v. Rhodes*, 4 Sandf. Ch. 434.

<sup>7</sup> *Bliss v. City of Brooklyn*, 10 Blatchf. 217.

ruled, it was held to be a waiver.<sup>1</sup> It has even been held that where the defendant sent his answer to the clerk before he knew that the complainant was a non-resident, but the clerk did not file it at once, and in the interval the defendant received notice of the complainant's non-residence, the filing of the answer after such notice, though the defendant believed it had been filed before, disentitled the defendant to security.<sup>2</sup> But it has been said that this ruling can only be defended on the ground that the clerk, in what he did or omitted to do, should be regarded, not as a public officer, but as the agent of the defendant.<sup>3</sup> If the defendant sets a cause down for hearing, it is a waiver of an order previously obtained against the non-resident complainant for security for costs.<sup>4</sup> If the defendant do not demand security for costs within a reasonable time, it is not a ground for a continuance that such security has not been given when the cause is called for trial.<sup>5</sup>

§ 1042. *Suits in forma pauperis* — Application for leave. "The right to sue *in forma pauperis* originated in the statute of Henry VII. This and the subsequent statute of Henry VIII. are confined to actions in the courts of common law, and do not extend to defendants. The courts of equity have adopted the principle of these statutes, and proceeding further have extended the relief to the case of defendants."<sup>6</sup> The privilege will not be extended to a plaintiff or a defendant suing or being sued in a representative capacity, as executor or administrator.<sup>7</sup> An infant may be permitted to sue or defend *in*

<sup>1</sup> Goodrich v. Pendleton, 8 Johns. Ch. 520.

<sup>2</sup> Dyott v. Dyott, 1 Madd. 187.

<sup>3</sup> Shuttleworth v. Dunlop, 34 N. J. Eq. 488, 498, per Van Fleet, V. C.

<sup>4</sup> Hay v. Power, 2 Edw. Ch. 494. Where the plaintiff amended his bill, and stated thereby that he was out of the jurisdiction, it was held that the defendant could require security for costs, although he had some notice of plaintiff's being a non-resident previously to the date of the amendment. Wyllie v. Ellice, 11 Beav. 99. See, also, Stewart v. Stewart, 30 Beav. 320.

<sup>5</sup> Hawkins v. Willbank, 4 Wash. (C. C.) 285.

<sup>6</sup> Lord Lyndhurst in Oldfield v. Corbett, 1 Phil. 618, 615.

<sup>7</sup> Paradise v. Shepherd, 1 Dick. 136; Oldfield v. Corbett, 1 Phil. 618; Fowler v. Davies, 16 Sim. 182; St. Victor v. Devereaux, 6 Beav. 584. Applications for leave to sue *in forma pauperis* should not be encouraged. The chancellor said: — "Applications of this kind are not to be encouraged in this State, where every healthy and industrious citizen can earn sufficient to support himself and also to enable him to pay the moderate fees of

*forma pauperis*.<sup>1</sup> And an infant was permitted to defend *in forma pauperis* in a federal court in opposition to the settled and acknowledged doctrine of the courts of the State in which the federal court was held.<sup>2</sup> A pauper may also appeal.<sup>3</sup> In the English chancery the plaintiff, in order to be admitted to sue *in forma pauperis*, was required to present a petition to the master of the rolls containing a short statement of his case, and of the proceedings, if any, which had taken place in the cause, and praying to be admitted to sue *in forma pauperis*, and that a counsel and solicitor might be assigned to him.<sup>4</sup> This petition when filed by a complainant was underwritten by a certificate, signed by counsel, that he conceived the case to be proper for relief in the court, and supported by an affidavit sworn by the plaintiff "that he is not worth in all the world the sum of £5 after payment of his just debts, his wearing apparel and the matters in question in the cause only excepted."<sup>5</sup> The affidavit must be sworn to by

the officers of this court." *Isnard v. Cazeaux*, 1 Paige, 89, 40.

<sup>1</sup> *Ferguson v. Dent*, 15 Fed. Rep. 771. *Contra* in Tennessee. See the following note; and see *Brown v. Story*, 1 Paige, 588, as to defending *in forma pauperis*. The next friend of an infant plaintiff cannot be compelled to give security for costs. *St. John v. Earl of Besborough*, 1 Hogan, 41. *Contra*, *Fulton v. Roosevelt*, 1 Paige, 178, where Chancellor Walworth said that, "Perhaps, in a proper case, on an application to the court, an infant who had no means to indemnify a responsible person for costs might be permitted to sue by his next friend *in forma pauperis*. I see no objection to such a proceeding, though Lord Eldon intimated it could not be done. But in such a case the court would in the first place see that there was probable cause for the proceeding, and appoint a proper person to prosecute the suit as *prochein amy*." But the next friend of a *feme covert* must be a person of substance and able to pay the costs

of the proceedings. *Anon.*, 1 Atk. 570; *Pennington v. Manning*, 8 Dr. & War. 154; *Jones v. Fawcett*, 2 Phil. 278; *Stevens v. Williams*, 1 Sim. (N. S.) 445; *Wilton v. Hill*, 2 De G., M. & G. 807, 809; *Hind v. Whitmore*, 2 K. & J. 458; *Re Wills*, 9 Jur. (N. S.) 1225; *Elliott v. Ince*, 7 De G., M. & G. 975.

<sup>2</sup> *Ferguson v. Dent*, 15 Fed. Rep. 771. In Tennessee practice it has long been settled that under the statutes of that State a minor can neither sue by his next friend, nor by his guardian *ad litem* defend *in forma pauperis*. 8 Meigs' Dig. (2d ed.) 2099; *Cargle v. Railroad Co.*, 7 Lea, 717; *Sharer v. Gill*, 6 Lea, 495; *Musgrove v. Lusk*, 5 Baxt. 689; *Green v. Harrison*, 3 Sneed, 130; *McCoy v. Broderick*, 3 Sneed, 201; *Cohen v. Shyer*, 1 Tenn. Ch. 192.

<sup>3</sup> *Bland v. Bland*, 2 J. & W. 402; *Contra*, *Taylor v. Bouchier*, 2 Dick. 504; *Bolton v. Gardner*, 3 Paige, 278.

<sup>4</sup> 1 Daniell's Ch. Pr. (4th ed.) 40.

<sup>5</sup> 1 Daniell's Ch. Pr. (2d Am. ed.) 46; *Brown v. Story*, 1 Paige, 588.

the party himself, and not by a third person.<sup>1</sup> The master of the rolls thereupon, if no cause appeared against it, entered an order admitting the party to sue *in forma pauperis*, and assigned a counsel and solicitor to act on his behalf.<sup>2</sup> It was necessary to serve the order upon the opposite party as soon as possible; and a plaintiff admitted to sue *in forma pauperis* was ordered to pay *dives* costs to the defendant in respect of a step in the cause taken before service of the order.<sup>3</sup> The counsel or solicitor thus assigned could not decline to act, unless upon sufficient ground shown to the court.<sup>4</sup> Nor could such counsel or solicitor take any fee, profit or reward for his services, and an agreement therefor constituted a contempt of court.<sup>5</sup> A pauper who is defeated is not ordered to pay costs to the defendant.<sup>6</sup> After a party is admitted to prosecute as a pauper, he is liable for the costs of any irregular<sup>7</sup> or scandalous proceedings on his part.<sup>8</sup> A claim to be excused from paying costs already accrued upon being admitted to defend *in forma pauperis* has never been allowed.<sup>9</sup> The costs of a successful party are in the discretion of the court.<sup>10</sup> And where costs are ordered to be paid to a party suing or defending *in forma pauperis*, such costs are to be taxed as *dives* costs, unless the court otherwise directs.<sup>11</sup> As a party may be admitted to sue *in forma pauperis* at any time during the suit, so if, at any time, it is made to appear

See as to the poverty which entitles a person to sue *in forma pauperis*, Allen v. McPherson, 5 Beav. 469, 485; Boddington v. Woodley, 5 Beav. 555; Goldsmith v. Goldsmith, 5 Hare, 125; Perry v. Walker, 1 Coll. 233, 236; Isnard v. Cazeaux, 1 Paige, 89.

<sup>1</sup> Wilkinson v. Belsher, 2 Bro. C. C. 272.

<sup>2</sup> 1 Daniell's Ch. Pr. (4th ed.) 41.

<sup>3</sup> Ballard v. Catling, 2 Keen, 606. In Isnard v. Cazeaux, 1 Paige, 89, an order obtained on an *ex parte* application was vacated with costs.

<sup>4</sup> 1 Daniell's Ch. Pr. (4th ed.) 41.

<sup>5</sup> 1 Daniell's Ch. Pr. (4th ed.) 41.

<sup>6</sup> 1 Daniell's Ch. Pr. (4th ed.) 42.

<sup>7</sup> Brown v. Story, 1 Paige, 588. A

party suing *in forma pauperis* is chargeable with the costs of setting aside his proceedings for irregularity, or of a contempt, or of expunging impertinent or scandalous matter, in the same manner as other suitors. Richardson v. Richardson, 5 Paige, 58.

<sup>8</sup> Rattray v. George, 16 Ves. 232.

<sup>9</sup> Brown v. Story, 1 Paige, 588.

<sup>10</sup> Scatchmer v. Faulkard, 1 Eq. Cas. Abr. 125, pl. 3; Hutton v. Hager, cited in Angell v. Smith, Prec. Ch. 220; Wallop v. Warburton, 2 Cox, 409; Rattray v. George, 16 Ves. 233; Church v. Marsh, 2 Hare, 655; Roberts v. Lloyd, 2 Beav. 876; Williams v. Wilkins, 3 Johns. Ch. 65.

<sup>11</sup> 1 Daniell's Ch. Pr. (4th ed.) 42.



to the court that he is of such ability that he ought not to be allowed to sue or to continue to sue *in forma pauperis*, the court will dispauper him.<sup>1</sup>

§ 1043. **Taxation and retaxation of costs.**— Questions of costs ordinarily do not properly arise before the taxation, and are not determined by a court in advance, without allowing parties an opportunity to be heard.<sup>2</sup> The United States Revised Statutes provide that "The bill of fees of the clerk, marshal and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party."<sup>3</sup> An affidavit of the party claiming a bill for services or of some person having knowledge of the facts should be attached to the bill, and filed therewith, showing that the services charged therein have been actually and necessarily performed as therein stated.<sup>4</sup> Though there may have been agreements of counsel on both sides in relation thereto, costs for printing the bill, answer and evidence in a suit in the United States circuit court cannot be taxed, since there is no rule of court on the subject, and nothing is said about such costs in the Revised Statutes providing the fees which may be taxed.<sup>5</sup> A motion for retaxation of costs taxed by the clerk may be made before or on appeal taken to a judge of the court.<sup>6</sup> A complainant who has not appealed cannot question the correctness of a taxation from which the respondent has appealed.<sup>7</sup> On application for retaxation the court will not permit a party to retain in his bill charges which are clearly improper, although no objection was made to them before the taxing officer.<sup>8</sup> The party applying for a retaxa-

<sup>1</sup> Romilly v. Grint, 2 Beav. 186; Mather v. Shelmerdine, 7 Beav. 267; Butler v. Gardener, 12 Beav. 525; Perry v. Walker, 1 Coll. 229; Goldsmith v. Goldsmith, 5 Hare, 125.

<sup>2</sup> Ferguson v. Dent, 46 Fed. Rep. 88, 96.

<sup>3</sup> U. S. R. S., § 983.

<sup>4</sup> U. S. R. S., § 984.

<sup>5</sup> Lee v. Simpson, 42 Fed. Rep. 434.

<sup>6</sup> In re Strauss v. Meyer, 23 Fed. Rep. 467; Tuck v. Olds, 28 Fed. Rep. 883.

<sup>7</sup> American Box Match Co. v. Crossman, 57 Fed. Rep. 1029.

<sup>8</sup> Pentz v. Hawley, 2 Barb. Ch. 552.

tion of costs will be charged with the costs of opposing his application where he does not succeed in obtaining a retaxation as to any of the items objected to before the taxing officer.<sup>1</sup> It is not proper ground for granting a retaxation of costs in behalf of a party who has appeared and opposed particular items in the bill that the taxing officer has, by inadvertence, erroneously allowed an item which was not objected to before him.<sup>2</sup> It is not a matter of course to allow costs to a party who has attended to oppose the taxation of a bill of costs against him, upon notice, where the party giving such notice neglects to bring on the taxation at the time specified. But the court has the power to allow costs for such attendance to oppose a taxation in a proper case.<sup>3</sup>

§ 1044. *Costs on appeals.*— Upon a reversal of a decree for want of a sufficient averment of citizenship to confer jurisdiction on the court below, costs in the United States Supreme Court are allowed against the complainant.<sup>4</sup> Where the court below dismissed a bill upon the merits, and the decree was reversed by the Supreme Court for want of jurisdiction in equity, with directions to dismiss accordingly, the reversal was with costs in the court below and each party to pay his costs in the appeal.<sup>5</sup> Where each cross-appellant secured the reversal of the judgment in an important point the costs in the Supreme Court were divided.<sup>6</sup> Where the master re-

<sup>1</sup> *Pentz v. Hawley*, 2 Barb. Ch. 552. If the party applying for a retaxation of costs succeeds only as to part of the exceptions contained in the papers on which his application is founded, neither party will be entitled to costs on the motion. *Lloyd v. Brewster*, 5 Paige, 87.

<sup>2</sup> *Pentz v. Hawley*, 2 Barb. Ch. 552.

<sup>3</sup> *Greene v. Wheeler*, 9 Paige, 608.

<sup>4</sup> *Menard v. Goggan*, 121 U. S. 253; *Peninsula Iron Co. v. Stone*, 121 U. S. 681; *Everhart v. Huntsville Female College*, 120 U. S. 228. In *Peper v. Fordyce*, 119 U. S. 469, both parties being blamable, the costs of the appeal were divided equally between the parties, and each party

paid his own costs in the circuit court.

<sup>5</sup> *Rogers v. Durant*, 106 U. S. 644.

<sup>6</sup> *Sioux City &c. R. Co. v. Chicago &c. R. Co.*, 117 U. S. 406. Where an appellant succeeded only as to a part of the matters of the appeal, neither party was allowed any costs as against the other upon the appeal. *Stafford v. Mott*, 8 Paige, 100. Where there was a joint appeal by two defendants, and the decree was reversed as to one and affirmed as to the other, no costs were given in favor of either party to the appeal. *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige, 127. Where two or more defendants bring a joint appeal, and fail as

ported no profits and nominal damages, in a suit for infringement of a patent, on exception by the plaintiff, the circuit court allowed a sum for damages, and the Supreme Court reversed its decree, plaintiff was allowed costs in the circuit court to and including the interlocutory decree, and the defendant was allowed costs after the decree.<sup>1</sup> Upon separate appeals by the different defendants in a suit to settle their rights to a fund in court, costs cannot be awarded between the different appellants unless they have made each other parties to their respective appeals.<sup>2</sup> If an administratrix brings an appeal for her own benefit, and fails therein, she will be personally charged with the costs of the appeal.<sup>3</sup> A mere technical error in drawing up an order, which would have been corrected as a matter of course upon a suggestion to the court below, will not affect the right of the respondent to costs upon an appeal from the whole order, although the error is corrected upon the appeal.<sup>4</sup> A complainant whose decree was affirmed in the appellate court was refused costs in that court because they had been exorbitantly increased by superfluous recitals and statements in the bill of complaint.<sup>5</sup>

to the main object of such appeal, they will be charged with costs although one of them succeeds in obtaining a modification of the decree in respect to his own interest merely. *Atlantic Ins. Co. v. Storow*, 5 Paige, 265.

<sup>1</sup> *Dobson v. Hartford Carpet Co.*, 114 U. S. 439.

<sup>2</sup> *Potter v. Chapin*, 6 Paige, 639.

<sup>3</sup> *Gardner v. Gardner*, 6 Paige, 455.

<sup>4</sup> *Bank of Monroe v. Widner*, 11 Paige, 529.

<sup>5</sup> *Vliet v. Wyckoff*, 42 N. J. Eq. 642.

THE END.

## **APPENDIXES.**



## APPENDIX I.

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### ACT CREATING UNITED STATES CIRCUIT COURTS OF APPEALS.

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ACTS OF FIFTY-FIRST CONGRESS, SESS. II, CH. 517, APPROVED  
MARCH 3, 1891: 26 U. S. ST. AT L. 826.

AN ACT to establish circuit courts of appeals and to define and regulate in  
certain cases the jurisdiction of the courts of the United States, and  
for other purposes.

*Be it enacted by the Senate and House of Representatives of  
the United States of America in Congress assembled,* That  
there shall be appointed by the President of the United States,  
by and with the advice and consent of the Senate, in each  
circuit an additional circuit judge, who shall have the same  
qualifications, and shall have the same power and jurisdiction  
therein, that the circuit judges of the United States, within  
their respective circuits, now have under existing laws, and  
who shall be entitled to the same compensation as the circuit  
judges of the United States in their respective circuits now  
have.

SEC. 2. That there is hereby created in each circuit a cir-  
cuit court of appeals, which shall consist of three judges, of  
whom two shall constitute a quorum, and which shall be a  
court of record with appellate jurisdiction, as is hereafter  
limited and established. Such court shall prescribe the form  
and style of its seal and the form of writs and other process  
and procedure as may be conformable to the exercise of its  
jurisdiction as shall be conferred by law. It shall have the  
appointment of the marshal of the court, with the same duties  
and powers under the regulations of the court as are now

provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for and paid over to the treasury department of the United States in the same manner as is now provided in respect of the costs and fees in the Supreme Court.

The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

SEC. 3. That the chief justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the chief justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the chief justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

In case the full court at any time shall not be made up by the attendance of the chief justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, that no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing court, shall sit on the trial or hearing of such cause or question in the circuit court of ap-

peals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of Saint Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts.

Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise, from said district courts, shall only be subject to review in the Supreme Court of the United States, or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of a conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the constitution of the United States.

In any case in which the constitutionality of any law of the



United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for a review of such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the district courts and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed.

SEC. 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: *Provided*, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.

SEC. 8. That any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

SEC. 9. That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the attorney-general of the United States and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs and messengers: *Provided, however*, that in case proper rooms cannot be provided in such buildings, then the said marshals, with the approval of the attorney-general of the United States, may, from time to time, lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs and messengers shall be allowed the same compensation for their respect-

ive services as are allowed for similar services in the existing circuit courts.

Sec. 10. That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court, the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever, on appeal or writ of error or otherwise, a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court, the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever, on appeal or writ of error or otherwise, a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final, such cause shall be remanded to the said district or circuit court for further proceedings, to be there taken in pursuance of such determination.

Sec. 11. That no appeal or writ of error by which any order, judgment or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out, except within six months after the entry of the order, judgment or decree sought to be reviewed: *Provided, however*, that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the method and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error; and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

SEC. 12. That the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.

SEC. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.

SEC. 14. That section six hundred and ninety-one of the Revised Statutes of the United States and section three of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby, repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

SEC. 15. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders and decrees of the Supreme Courts of the several Territories as by this act they may have to review the judgments, orders and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits.

Approved March 3, 1891.

ACTS OF FIFTY-FIRST CONGRESS, SESS. II, JOINT RESOLUTION,  
APPROVED MARCH 3, 1891: 26 U. S. ST. AT L. 1115.

JOINT RESOLUTION to provide for the organization of the circuit courts of appeals.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first meetings of the several circuit courts of appeals mentioned in the act of congress passed at this present session, entitled

"An act to establish circuit courts of appeals and to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes," shall be held on the third Tuesday in June, A. D. 1891; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the Supreme Court of the United States assigned to such circuit, shall direct. *And be it further resolved*, that nothing in said act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any circuit court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, *anno domini*, eighteen hundred and ninety-one.

Approved March 3, 1891.

## APPENDIX II.

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### RULES OF THE SUPREME COURT OF THE UNITED STATES

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#### 1. CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice either as attorney or counselor in this court or in any other court while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court-room or from the office without an order from the court, except as provided by rule 10.

#### 2. ATTORNEYS AND COUNSELORS.

1. It shall be requisite to the admission of attorneys or counselors to practice in this court that they shall have been such for three years past in the Supreme Courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, viz.:

I, — — —, do solemnly swear [*or, affirm*] that I will demean myself, as an attorney and counselor of this court, uprightly and according to law, and that I will support the constitution of the United States.

#### 3. PRACTICE.

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court; and will from time to time make such alterations therein as circumstances may render necessary.

#### 4. BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

#### 5. PROCESS.

1. All process of this court shall be in the name of the President of the United States.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

3. Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

#### 6. MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with

a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless for satisfactory reasons further time be given by the court to either party.

5. There may be united with a motion to dismiss a writ of error or an appeal a motion to affirm, on the ground that although the record may show that this court has jurisdiction it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

6. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that date to the other business of the court; the motion day shall be Monday of each week, and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

#### 7. LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be



charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for, and forfeit and pay twice the value thereof; and also one dollar per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner, and he shall not permit such books to be taken therefrom by any one except the justices of the court.

#### 8. WRIT OF ERROR, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error and citations must be made returnable not exceeding thirty days from the day of signing the citations, whether the return day fall in vacation or in term time, and be served before the return day.

[Thus amended, 187 U. S. 710.]

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

#### 9. DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule unless by order of the court.

[Thus amended, 187 U. S. 710.]

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or

appellee at any time thereafter, the case shall stand for argument.

[Thus amended, 187 U. S. 710.]

8. 'Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

4. In all cases where the period of thirty days is mentioned in rule 8, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska and Idaho.

[Thus amended, 187 U. S. 710, 711.]

#### 10. PRINTING RECORDS.

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1, 1884, the case shall be dismissed.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under rule 8, section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to

time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees.

OCTOBER TERM, 1886.

ORDERED, that the following section be added to rule 10:

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing in the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such

other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under rule 24, section 7, shall be computed as at present in the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

Promulgated March 28, 1887: 120 U. S. 785.

#### 11. TRANSLATIONS.

Whenever any record, transmitted to this court upon a writ of error or appeal, shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court in order that a translation may be there supplied and inserted in the record.

#### 12. FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission to be issued from this court, or from any circuit court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided,*

*however*, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where, by law, it is admissible.

### 13. OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

### 14. CERTIORARI.

No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

### 15. DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: *Provided, however*, that a

copy of every such order shall be printed in some newspaper of general circulation within the State, Territory or district from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree rendered in the circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error, or appellant, shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and

on hearing have the judgment or decree reversed if the same be erroneous: *Provided, however*, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing; and *provided*, also, that in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required by the opposite party, the case shall abate; and *provided*, also, that the said representative may, at any time, before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

#### 16. NO APPEARANCE OF PLAINTIFF.

Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for a trial the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

#### 17. NO APPEARANCE OF DEFENDANT.

Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

#### 18. NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

#### 19. NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.



## 20. PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term, and, in addition, appeals from the court of claims may be submitted by both, within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counselors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

## 21. BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated —

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as

particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary and by request of the court.

6. When no counsel appears for one of the parties and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed the adverse party will be entitled to be heard by two counsel.

## 22. ORAL ARGUMENTS.

1. The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side shall be allowed for the argument and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: *Provided, always*, that a fair opening of the case shall be made by the party having the opening and closing arguments.

## 23. INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent. in addition to interest shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if especially directed by the court.

[Thus amended, 188 U. S. 711.]

## 24. COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The costs of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio.

For making a manuscript copy of the record, when required under rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompany papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every copy of any opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

## 25. OPINIONS OF THE COURT.

1. All opinions delivered by the court shall immediately, upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter, as soon as the same shall be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

## 26. CALL AND ORDER OF THE DOCKET.

[As amended in October Term, 1888: 180 U. S. 706.]

1. The court on the second day in each term will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day, during the term,

in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. Criminal cases may be advanced, by leave of the court, on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also by leave of the court be advanced on motion of the attorney-general.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reason for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court. Every case which shall have been called in its order and passed and put at the foot of the docket shall, if not again reached during the term it was called, be continued to the next term of the court.

8. Two or more cases involving the same question may, by the leave of the court, be heard together, but they must be argued as one case.

9. If, after a case has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either

may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case without placing it at the foot of the docket will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

#### 27. ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

#### 28. DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

#### 29. SUPERSEDEAS.

*Supersedeas* bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in the custody of the marshal, under

admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of the suit and just damages for delay, and costs and interest on the appeal.

### 30. REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

### 31. PRINTED RECORDS AND BRIEFS.

All records, arguments and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together so to make an ordinary octavo volume.

### 32. WRITS OF ERROR AND APPEALS UNDER THE ACT OF FEBRUARY 25, 1889, CHAPTER 236, AND THE ACT OF MARCH 3, 1891, CHAPTER 517.

Cases brought to this court by writ of error or appeal, under the act of February 25, 1889, chapter 236, or under section 5 of the act of March 3, 1891, chapter 517, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by rule 6 in regard to motions to dismiss writs of error and appeals.

[Thus amended October term, 1892.]

### 33. MODELS, DIAGRAMS AND EXHIBITS OF MATERIAL.

1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the



custody of the marshal of this court at least one month before the case is heard or submitted.

2. All models, diagrams and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them or make such other disposition of them as to him may seem best.

• 34. CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where for special reasons sureties ought not to be required.

[Promulgated March 29, 1886; and as amended, May 10, 1886: 117 U. S. 708.]

35. ASSIGNMENT OF ERRORS.

1. Where an appeal or writ of error is taken from a district court or a circuit court direct to this court, under section 5 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which

shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to, *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed according to the provisions of sections 2, 3, 4, 5, 6 and 9 of rule 10.

[Promulgated May 11, 1891: 189 U. S. 705.]

### 36. APPEALS AND WRITS OF ERROR.

1. An appeal or a writ of error from a circuit court or a district court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security to be taken and the citations signed by him, and he may also grant a *superseas* and stay of execution or of proceedings pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

[Promulgated May 11, 1891: 189 U. S. 706.]

**37. CASES FROM CIRCUIT COURT OF APPEALS.**

1. Where, under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application.

[Promulgated May 11, 1891: 189 U. S. 706.]

**38. INTEREST, COSTS AND FEES.**

The provisions of rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of sections 5 and 6 of the said act.

[Promulgated May 11, 1891: 189 U. S. 707.]

## APPENDIX III.

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### RULES OF THE UNITED STATES CIRCUIT COURTS OF APPEALS.

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#### 1. NAME.

The court adopts "United States Circuit Court of Appeals for the " — <sup>1</sup> Circuit " as the title of the court.

#### 2. SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge, and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words " — <sup>2</sup> Circuit " in two lines in the center, with a dash beneath.

#### 3. TERMS.<sup>3</sup>

One term of this court shall be held annually at the city of — <sup>4</sup> on the — <sup>5</sup> of — <sup>6</sup>.

<sup>1</sup> First, second, third, fourth, fifth, sixth, seventh, eighth, and ninth, respectively.

<sup>2</sup> First, second, third, fourth, fifth, sixth, seventh, eighth, and ninth, respectively.

<sup>3</sup> In the first circuit this rule reads as follows:—"TERMS AND SESSIONS.—One term of this court shall be held annually at the city of Boston, at ten o'clock in the forenoon on the first Tuesday of October. Stated sessions thereof shall be there held at

the same hour, on the first Tuesday of every month, and may be adjourned to such times and places as the court may from time to time designate. But, unless otherwise ordered, any adjournment shall be held to have been made to the first day of the next stated session."

In the third circuit this rule reads as follows:—"TERMS.—The terms of this court shall commence and be held on the first Tuesday of March and the third Tuesday of September

## 4. QUORUM.

1. If at any term a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If,

in each year, except the present term, at the city of Philadelphia."

In the fourth circuit this rule reads as follows:—"TERMS.—There shall be held in the city of Richmond three regular terms of this court: One on the first Tuesday of February, one on the fourth Tuesday of May, and one on the first Tuesday of October, in each year."

In the sixth circuit rule 8 reads as follows:—"TERMS.—One term of this court shall be held annually at the city of Cincinnati on the first Monday of October for the hearing of cases, and adjourned sessions on the first Monday of February and May, for the same purpose, at such places as the court may from time to time designate. A session shall also be held at Cincinnati on the first Monday of each other month, except August and September, for the announcing of opinions and for miscellaneous business only."

In the seventh circuit this rule reads as follows:—"TERMS.—A term of this court shall be held annually, at the city of Chicago, on the first Monday in October, and continue until the first Monday in October of the succeeding year. Each term shall be adjourned to such times and places as the court may from time to time designate. The first regular term shall commence on the first Monday in October, 1891."

In the eighth circuit this rule reads as follows:—"TERMS.—One term of this court shall be held annually at the city of St. Louis, Mis-

souri, on the first Monday in December, and one term of this court shall be held annually at the city of St. Paul, Minnesota, on the first Monday in May; and such terms of said court may be adjourned to such times as the court may from time to time designate. Promulgated June 20, 1892."

In the ninth circuit the following order was entered June 22, 1891:—

"TERMS OF COURT, WHEN AND WHERE HELD AND DESIGNATION OF JUDGES.—1. It is hereby ordered that a term of the United States circuit court of appeals for the ninth circuit be held annually at the city of San Francisco, on the first Monday of October of each year, and that said term shall be regarded as continuing open, and a court may be held upon notice to parties at any time during the year. And said court shall be held at such other times and places as the court may from time to time designate. 2. It is further ordered that said court, unless otherwise specially directed by the court, shall meet at San Francisco on the first Mondays, respectively, of January, April and July of each year; and a calendar of all cases then pending shall be made by the clerk, to be called for hearing on said days. Until the further order of the court, it is ordered that, when it shall be necessary to call upon one or more of the district judges to form a quorum or constitute a full bench, the district judges, in the order of their seniority, be and

during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding or process depending in or returned to the court, preparatory to hearing, trial or decision thereof.

they are hereby respectively designated to sit in the United States circuit court of appeals, in pursuance of the provision of the statute; and upon the direction of the presiding judge, from time to time, as the occasion may require, the clerk of the court shall notify the district judges, respectively, when their presence will be so required. Should one or more of the district judges so designated for any cause fail to attend at any such time, the next in seniority is hereby designated to attend and sit in the place of the judge or judges so failing to attend, unless otherwise directed by a special order of the court made for the occasion."

"In the first circuit, Boston; in the second circuit, New York; in the third circuit, Philadelphia (see the preceding note); in the fourth circuit, Richmond—three regular terms annually (see the preceding note); in the fifth circuit, New Orleans, and adjourned sessions "at such places as the court may from time to time designate" (see the preceding note); in the sixth circuit, Cincinnati; in the seventh circuit, Chicago (see the preceding note); in the eighth circuit, St. Louis and St. Paul (see the preceding note); in the ninth circuit, San Francisco.

"In the first circuit, "first Tuesday" (see the first note to this rule); in the second circuit, "last Tuesday;" in the third circuit, on the first Tuesday

of March and the third Tuesday of September (see the first note to this rule); in the fourth circuit, on the first Tuesday of February, fourth Tuesday of May and first Tuesday of October (see the first note to this rule); in the fifth circuit, "third Monday;" in the sixth circuit, "first Monday;" in the seventh circuit, "first Monday" (see the first note to this rule); in the eighth circuit, at St. Louis, Missouri, on the first Monday in December, and at St. Paul, Minn., on the first Monday in May (see the first note to this rule); in the ninth circuit, "first Monday."

"In the first circuit, "October" (see the first note to this rule); in the second circuit, "October;" in the third circuit, on the first Tuesday of March and the third Tuesday of September (see the first note to this rule); in the fourth circuit, on the first Tuesday of February, fourth Tuesday of May and first Tuesday of October (see the first note to this rule); in the fifth circuit, "November;" in the sixth circuit, "October;" "and adjourned sessions on the first Monday of February and May" (see the first note to this rule); in the seventh circuit, "October" (see the first note to this rule); in the eighth circuit, at St. Louis, Missouri, on the first Tuesday in December, and at St. Paul, Minn., on the first Monday in May (see the first note to this rule). For the ninth circuit, see the first note to this rule.

### 5. CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.<sup>1</sup>

2. The clerk shall not practice, either as attorney or counselor, in this court, or in any other court, while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in a sum to be fixed,<sup>2</sup> and with sureties to be approved by the court, faithfully to discharge the duties of his office, and seasonably to award the decrees, judgments and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office without an order from the court.

### 6. MARSHAL, CRIER AND OTHER OFFICERS.<sup>3</sup>

1. Every marshal and deputy marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by section 782 of the Revised Statutes, and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed,<sup>4</sup> and with sureties to be approved by the court, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may from time to time order.

<sup>1</sup> Subdivision 1 of rule 5 in the fifth circuit reads as follows: — "The clerk's office shall be kept at the city of New Orleans."

<sup>2</sup> In the fifth circuit, "in the sum of ten thousand dollars (\$10,000)."

<sup>3</sup> In the first circuit rule 6 reads as follows: "The marshal shall be in

attendance during the sessions of the court, with such number of bailiffs, messengers and other officers as the court may from time to time order."

In the eighth circuit subdivision 1 of this rule is omitted.

<sup>4</sup> In the fifth circuit in the sum of ten thousand dollars (\$10,000).

7. ATTORNEYS AND COUNSELORS.<sup>1</sup>

All attorneys and counselors admitted to practice in the Supreme Court of the United States, or in any court of the United States, shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

<sup>1</sup>In the eighth circuit rule 7 reads as follows:—“All attorneys and counselors admitted to practice in the Supreme Court of the United States, or in any circuit court of the United States, or in the Supreme Court of any State in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor. (2) And any attorney and counselor admitted to practice in the courts of highest original jurisdiction in the States and Territories of this circuit, or in the Supreme Courts of such States and Territories, or in the district or circuit courts of the United States for this circuit, will be admitted to practice and enrolled as an attorney and counselor of this court, upon furnishing to the clerk of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts; and upon subscribing and forwarding to the clerk the following oath: ‘I do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of the circuit court of appeals for the eighth circuit, uprightly and according to law; and that I will support the constitution of the United

States. So help me God.” Section 2. Promulgated June 27, 1892.

In the ninth circuit rule 7 reads as follows:—“All attorneys admitted to the practice in the Supreme Court of the United States, or in any circuit court of the ninth circuit, shall be deemed attorneys of the circuit court of appeals for the ninth circuit; but such attorneys, on or before their first appearance in open court, in said court, shall take an oath or affirmation, in the form prescribed by rule 2 of the Supreme Court of the United States, and subscribe the roll of attorneys. All other persons who have been admitted to practice in the highest court of any State or Territory, upon presenting satisfactory evidence of good moral character and fair professional standing, may be admitted to practice in said court, upon taking the oath so prescribed, and subscribing the roll of attorneys.”

In the third circuit the following clause is added to rule 7:—“And all attorneys and counselors of the circuit court of the United States, for the third circuit, shall be attorneys and counselors of this court without taking any further oath.”

In the fifth circuit rule 7 reads as follows:—“All attorneys and counselors admitted to practice in the Supreme Court of the United States, or any circuit court of the United States, upon filing certificate of such



## 8. PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

## 9. PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

## 10. BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

## 11. ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged

admission with the clerk of this court, and upon taking an oath or affirmation in the following form, viz.:

I, ———, do solemnly swear [or, affirm] that I will demean myself as an attorney and counselor of this court uprightly and according to law, and that I will support the constitution of the United States.

(a copy of which shall also be filed with the clerk), shall become attorneys and counselors of this court: *Provided, however*, that any attorney or counselor eligible to admission as

an attorney and counselor of this court may be admitted to practice, on motion, in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll. No fees shall be charged by the clerk under this rule."

In the sixth circuit the following sentence is added to rule 7:—"A certificate of such admission, if demanded, shall be furnished upon the payment of a clerk's fee of two dollars and fifty cents."

is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

#### 12. OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record but the same shall otherwise be deemed to have been admitted by consent.

#### 13. SUPERSEDEAS AND COST BONDS.

1. *Supersedeas* bonds in the circuit and district courts must be taken with good and sufficient security that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof or a bond for the value thereof is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

#### 14. WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. The clerk of the court, to which any writ of error may be directed<sup>1</sup> shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 of the Supreme Court.

<sup>1</sup>In the third circuit the following being paid or tendered his fee there- words are here inserted:—"Upon for."

## 15. TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

## 16. DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return-day, whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.<sup>1</sup>

#### 17. DOCKET.<sup>2</sup>

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

<sup>1</sup>The following note is appended to rule 16 in the eighth circuit:—"A deposit of twenty-five dollars to secure clerk's costs is required before the record in a cause is filed and docketed."

<sup>2</sup>In the first circuit rule 17 reads as follows:—"1. The clerk shall enter and number consecutively upon a docket to be made for each term all cases brought to and pending in the court in their proper chronological order. 2. The clerk shall also make and print, thirty days before the first Tuesdays of October, January and April, respectively, a calendar of all the cases on the docket, in the order in which they stand thereon, except as follows: The calendar for October shall consist, first, of the cases from the district of Maine; second, those from the district of Rhode Island; and third, those from the district of Massachusetts. The calendar for January shall consist, first, of the cases from the district of New Hampshire; and second, those from the district of Massachusetts. The calendar for April shall consist, first, of the cases from the district of Maine; second, those from the district of New Hampshire; third, those from the district of Rhode Island; and fourth, those from the district of Massachusetts."

In the seventh circuit rule 17 reads as follows:—"The clerk shall prepare calendars of causes for the regular terms of this court to be held on the first Monday of October in each year, and calendars for each adjourned term of the court, placing thereon in proper chronological order only causes in which the record shall have been printed fully thirty days before such term or such adjourned term, and those causes in which, the record having been printed, briefs upon both sides have been filed."

In the ninth circuit rule 17 reads as follows:—"DOCKET.—The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit of twenty-five dollars in each case, enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error, or appellant, unless sufficient cause is shown for further postponement."

## 18. CERTIORARI.

No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

## 19. DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and, if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: *Provided, however*, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal the other party to the

suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory in the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall, thereupon, proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or District in which such representative resides, and upon such suggestion he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous.

*Provided, however,* that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence at least thirty days before the expiration of such ninety days.

*Provided, also,* that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required by the opposite party, the case shall abate: *And provided, also,* that the said representative may at any time, before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed and be heard and determined as in other cases.

## 20. DISMISSING CASES.

Whenever the plaintiff and defendant, in a writ of error pending in this court, or the appellant and the appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

21. MOTIONS.<sup>1</sup>

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

<sup>1</sup> "In the first circuit rule 21 reads as follows:— "1. The motion day shall be the first Tuesday of every stated session of the court, and any other Tuesday while the court shall remain in session. 2. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion. 3. All motions to dismiss writs of error or appeals (except motions to docket and dismiss under rule 16) or to advance cases, or for a writ of *certiorari*, and other special motions, shall be printed, and be accompanied by printed briefs. 4. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party or his counsel. 5. Any motion, of which counsel shall have given notice to the clerk in advance, shall be entered on the clerk's list in the order in which he receives notice thereof, and shall have priority in that order before other motions, unless otherwise specially ordered by the court. 6. Half an hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court granted before the argument begins."



22. PARTIES NOT READY.<sup>1</sup>

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

2. Where the defendant fails to appear when the case is

<sup>1</sup> In the first circuit rule 22 reads as follows:—“CALL AND ORDER OF THE CALENDAR.—1. On the first Tuesdays of October, January and April, the court will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the session in the same order, except as hereinafter provided. 2. Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed. 3. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case. 4. When a case is reached in the regular call of the calendar, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff. 5. If the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready, the case may be dismissed, or be postponed to the next session for the same district, as the court may order. 6. If a case is called for hearing at two stated sessions successively, and upon the call at the second session neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further

postponement. 7. The court may, by order entered on the first day of any stated session, make special assignments for the purpose of grouping cases in which the same judges are to sit. 8. No case coming from the district of Massachusetts shall be called before the second Tuesday of the session. 9. The court will not hear arguments on Mondays or Saturdays unless for special cause it shall so order. 10. Five cases shall be considered as liable to be called on each day during a stated session; but on the coming in of the court on each day the entire number of five cases will be called, with a view to the disposition of such of them as are not to be argued. 11. Revenue and other cases in which the United States are concerned, and which also involve or affect some matter of general public interest, and criminal cases, and cases once adjusted by this court on their merits, and again brought up by writ of error or appeal, may be advanced by leave or order of the court. 12. Two or more cases involving the same question may, by leave of the court, be heard together, to be argued as one case or more, as the court may order. 13. No stipulation or agreement of counsel to pass or postpone a case, or to substitute one case for another, shall be recognized as binding. A case can only be so passed, postponed or substituted upon application made and leave granted in open court.”

called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.<sup>1</sup>

### 23. PRINTING RECORDS.<sup>2</sup>

The counsel for the plaintiff in error or appellant shall print and file with the clerk of the court, at least six days before

<sup>1</sup> In the sixth circuit rule 23 is amended by adding another section, as follows:—"4. All causes shall stand for hearing when the time allowed for printing the records and the briefs of both parties shall have expired; provided, however, that causes may be heard when the records and briefs therein are printed, though the time allowed for printing records and briefs may not have expired."

<sup>2</sup> Rule 28 in the second circuit reads as follows:—"On the filing of the transcript in every case, the clerk shall forthwith cause fifteen copies of the same to be printed, and shall furnish three copies thereof to each party, at least thirty days before the argument, and shall file nine copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In

case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given."

Rule 28 in the first circuit reads as follows:—"1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf. 2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fees for preparing it for the printer, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when the case is reached at the regular call of the docket, the cause may be dismissed. 3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under the clerk's supervision, for the use of the court and of counsel. 4. The clerk shall take to the printer the original transcript on file; but shall cause copies to be

the case is called for argument,<sup>1</sup> twenty<sup>2</sup> copies of the record, unless a different order as to such printing is made by the court, either of its own motion, or upon application made at least ten days before the case is called for argument, and shall

made for the printer of such original papers sent up under rule 14, or other original papers, as are necessary to be printed. 5. The clerk shall supervise the printing, and see that the printed copies are properly indexed; and he shall distribute printed copies to the judges and the reporter, from time to time, as required, and three copies to the counsel for each party. An additional number of copies may be printed at the request of either party for his own use and at his own expense, or by order of the court. 6. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. 7. The clerk may receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing. 8. The clerk shall receive from the party at whose expense the record is printed, in addition to the cost of printing, fifteen cents for each printed page of the record and index, in full for preparing the record for the printer, indexing the same, supervising the printing, distributing the copies, and for all other incidental

services relating to the subject-matter of this rule, to be accounted for with his emoluments. 9. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel. 10. In case of reversal, affirmance or dismissal, with costs, the cost of printing the record and the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

In lieu of rule 28 the following rule was adopted in the third circuit, December 7, 1898, "the same to apply to cases hereafter brought to this court:—1. On the filing of the transcript, the clerk shall forthwith cause twenty copies of the record to be printed, and shall furnish three copies thereof to each party at least six days before the case is called for argument, and shall file fourteen copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk may demand of the plaintiff in error, or appellant, the cost of print-

<sup>1</sup> In the fourth circuit "at least twenty days before every term or adjourned term."

<sup>2</sup> In the second circuit fifteen copies to be printed by the clerk (see the first note to this rule).

furnish three copies of the printed record to the adverse party at least six days before the argument.<sup>1</sup> The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the

ing the record before ordering the same to be done. If the record shall not have been printed when the case is reached in the regular call of the docket, because of the failure of a party to advance the cost of printing, the case may be dismissed. In case of reversal, affirmance or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given. 2. The clerk shall receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portion which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

In the sixth circuit rule 28 reads as follows:—"1. The clerk shall supervise the printing of all records, and upon the docketing of a case shall forthwith cause an estimate to be made of the cost of printing the record, and his fee for preparing it for the printer, and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid the writ of error or appeal may be dismissed upon the motion of the opposite party or by the court of its

own motion. 2. After the payment to him of such estimate the clerk shall cause at least twenty-five copies of the record to be printed forthwith, and shall furnish to each of the respective parties three copies thereof, and take a receipt therefor. 3. Parties may agree by written stipulation filed with or prior to the filing of the record that parts only of the record shall be printed; and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. 4. If the cost of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same. If the cost is greater than the estimate, the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver any copies thereof. 5. In case of reversal, affirmance or dismissal, with costs, the amount paid for printing and supervision shall be taxed against the party against whom the costs are given, and shall be inserted in the mandate or other proper process. 6. In any case where the case shall have been printed in the court below, either circuit judge may, on the written application of the plaintiff in error or appellant, order that such printed record, if properly indexed, may be used in place of the printing hereinbefore provided for. 7. The clerk of this court shall receive proposals for printing, which shall be submitted

<sup>1</sup> In the second circuit "at least thirty days before the argument," etc. (see the first note to this rule).

In the fourth circuit "at least ten days before the term or adjourned term."

court may direct the printing of other parts of the record. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed.

to the senior circuit judge, who may in his discretion award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded. And when a case shall be heard upon a record printed in the court below, the cost for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree. 8. The fees of the clerk of this court for supervision shall be the same as those of the clerk of the Supreme Court for the same services, which are at present designated by Supreme Court Rule 24, as follows: For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the judges, the reporters, and the parties or their counsel, fifteen cents per folio. Promulgated January 2, 1894."

Rule 23 in the seventh circuit reads as follows:—"1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to be approved by the clerk, for the payment of all costs which shall be incurred in the cause. 2. The clerk, upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid the writ of error or appeal may be dismissed upon the motion of the

opposite party, or by the court of its own motion. 3. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to each of the respective parties at least three copies of the printed record, taking a receipt therefor; and the parties may, by written stipulation filed with or prior to the filing of the record, agree that only parts of the record shall be printed, and the case may be heard only on the parts so printed; but the court may direct the printing of other parts of the record. 4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party, on payment of the amount necessary for the printing of such extra copies. 5. The clerk shall supervise the printing, and see that the printed record is properly indexed. He shall distribute the printed copies to the justices of the court from time to time as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof. 6. In case of reversal, affirmance or dismissal with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same shall be taxed against the party against whom costs are given, and

In case of reversal, affirmance or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

shall be inserted in the body of the mandate or other proper process.

7. Upon the clerk's producing satisfactory evidence by affidavit or the acknowledgment of the parties, or their sureties or attorneys, of having served a copy of the bill of fees due from them respectively in this court on such parties, their sureties or attorneys, an attachment shall issue against such parties or their sureties respectively to compel the payment of said fees. 8. The clerk shall adopt a uniform size for the printing of all records, and the same shall be printed in small pica type, on clear white paper, with a margin of not less than an inch and a half, and show by a note or memorandum the time when each pleading or document was filed, and the printed record shall also contain running titles of its contents.

9. The briefs of attorneys shall also be printed, and conform as nearly as practicable to the size of the printed record. 10. The clerk shall, on or before the conclusion of each case, collect and file, or otherwise preserve together, one copy of the printed record and of each brief, printed motion and argument submitted in each case. 11. In any case where the record shall have been printed in the court below, the presiding judge may, on the application of the plaintiff in error or appellant, order that such printed record, if properly indexed, may be used in place of the printing hereinbefore provided for. 12. The clerk of this court shall advertise for proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who shall award such printing to the lowest

and best bidder; and all such printing shall be done by the person to whom the same is so awarded. And when a case shall be heard upon the record printed in the court below, the costs for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree. 13. The fees of the clerk of this court shall be the same as those of the clerk of the Supreme Court for the same services which are at present designated by the Supreme Court rule 24."

Rule 28 in the eighth circuit reads as follows:—"1. The plaintiff in error or appellant may, within twenty days after the allowance of any writ of error or appeal, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within twenty days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circum-

## 24. BRIEFS.

1. The counsel for the plaintiff in error or appellant<sup>1</sup> shall file with the clerk of this court, at least six<sup>2</sup> days before the case is called for argument, twenty<sup>3</sup> copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated:

(1) A concise abstract or statement of the case, presenting succinctly the questions involved in the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem*

stances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper. 2. On the filing of the transcript in every case the clerk shall cause the same, or the parts thereof designated under this rule, to be printed, and shall furnish three copies of the record so printed to each party at least thirty days before the argument. 3. The clerk shall be entitled to demand of the appellant or plaintiff in error the cost of printing the record before ordering the same to be done. 4. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. 5. In case of reversal, affirmance or

dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given. Promulgated June 20, 1892."

<sup>1</sup> In the sixth circuit the words "or appellant" are omitted from section 1 of rule 24. [As amended June 22, 1898.]

<sup>2</sup> In the second circuit "twenty." In the fourth circuit "ten." In the eighth circuit "twenty." In the ninth circuit "fifteen." In the sixth circuit after the word "court" is inserted the clause "within twenty-five days after the filing of the printed copies of the record as required in rule 23 as amended;" and in the seventh circuit, "within fifteen days after the date of the delivery by the clerk of the printed record."

<sup>3</sup> In the second circuit "ten."

*verbis*, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty<sup>1</sup> printed copies of his brief at least three<sup>2</sup> days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case unless that presented by the plaintiff in error or appellant is controverted.<sup>3</sup>

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary and by request of the court.

<sup>1</sup> In the second circuit the first sentence of section 8 of rule 24 reads as follows:—"The counsel for a defendant in error or an appellee shall file with the clerk, at least ten days before the case is called for hearing, ten copies of his printed brief, one of which shall, on application, be furnished to each of the counsel on the opposite side."

In the sixth circuit the first sentence of section 8 of rule 24 reads as follows:—"The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies

of his brief within forty days after the filing of the printed record, as required by rule 23 as amended."

<sup>2</sup> In the ninth circuit "five." In the seventh circuit "within fifteen days after the filing of the brief of the plaintiff in error or appellant."

<sup>3</sup> In the seventh circuit the following sentence is added to section 8 of rule 24:—"Either party may, at or before the argument of the cause, file a supplemental brief strictly confined to matter in reply to the brief of the opposite party."



6. When no counsel appears for one of the parties and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

## 25. ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.<sup>1</sup>

## 26. FORM OF PRINTED RECORDS, ARGUMENTS AND BRIEFS.<sup>2</sup>

All records, arguments and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

<sup>1</sup> In the seventh circuit another section is added to rule 25 as follows:—"Reading at length from briefs or reported cases shall not be indulged."

<sup>2</sup> In the fourth circuit rule 26 reads as follows:—"All records, arguments and briefs printed for the use of this court shall be in small pica type, twenty-four pica "ems" to a line, with an index and a suitable cover containing the title of the court and the cause, the court from which the case is brought into this court, and the number of the case. Size of

pages to be nine and one-fourth by six and one-fourth inches, except that in patent cases the size of the pages shall be ten and three-fourths by seven and five-eighths inches; that is to say, large enough to bind in copies of patent-office drawings and specifications without folding. So much of the record as was printed in the court below may be used in this court if they conform to this rule."

In the sixth circuit rule 26 (as amended January 2, 1894) reads as follows:—"1. All records shall be of

27. COPIES OF RECORDS AND BRIEFS.<sup>1</sup>

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs and arguments filed therein.

## 28. OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.<sup>2</sup>

2. The original opinions of the court shall be filed with the clerk of this court for preservation.<sup>3</sup>

3. The opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.<sup>4</sup>

a uniform size, printed in small pica type, twenty-four pica ems to a line, forty-eight lines to a page, solid, with an index, and a suitable cover containing the title of the court and cause, the court from which the case is brought to this court, and the number of the case; size of pages to be nine and one-fourth by six and one-fourth inches, except that in patent cases the size of the pages shall be ten and three-fourths by seven and five-eighths inches; that is to say, large enough to bind in copies of patent-office drawings and specifications without folding. 2. All arguments and briefs of attorneys shall be printed and conform as near as practicable to the size of the printed record."

In the seventh circuit rule 26 is repealed. See section 9 of the amended rule 28 in the seventh circuit—rule 28, n., at p. 1068, *supra*.

In the ninth circuit rule 27 reads as follows:—"All records, arguments

and briefs printed for the use of the court must be printed on unruled white writing paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page, exclusive of any marginal note, reference or running head, must be seven inches long and four inches wide, and the record must be properly indexed. Pica double-leaded is the only mode of composition allowed."

<sup>1</sup> In the seventh circuit rule 27 is repealed. See section 10 of the amended rule 28 in the seventh circuit—rule 28, n., at p. 1068, *supra*.

<sup>2</sup> In the third circuit section 1 of this rule reads as follows:—"All written opinions delivered by the court shall be delivered to the clerk and recorded."

<sup>3</sup> In the third circuit section 2 of this rule is omitted.

<sup>4</sup> In the sixth circuit section 3 of this rule is omitted.

29. REHEARING.<sup>1</sup>

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines.

## 30. INTEREST.

1. In cases where a writ of error is prosecuted in this court and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State<sup>2</sup> where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the pay-

<sup>1</sup> Rule 29 in the sixth circuit reads as follows:— "REHEARING.— A petition for rehearing after judgment can be presented only within thirty days after such judgment and not later, unless by special leave granted during such thirty days; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines."

In the seventh circuit this rule reads as follows:— "A petition for rehearing must be filed within thirty days after entry of judgment or decree, or after filing of the opinion,

shall be in print, and be served forthwith by copy upon the opposing party, who, within twenty days from such service, may file a printed answer, and the petition shall be determined without oral arguments, unless otherwise ordered. If a petition be not filed within the time allowed, or upon the overruling of a petition, the clerk shall, without special order, issue the mandate of the court to the court below. The copies of such petition or answer shall be filed with the clerk of this court."

<sup>2</sup> In the second, fourth, fifth, sixth, seventh, eighth, and ninth circuits respectively, the words "or Territorial" follow the word "State."

ment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

### 31. COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction,<sup>1</sup> costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party, but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the Supreme Court or removed thereto by *certiorari* or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

### 32. MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a *procedendo* shall be issued on the order of this court to the court below for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.<sup>2</sup>

<sup>1</sup> In the eighth circuit the clause "except where the dismissal shall be for want of jurisdiction" is omitted. <sup>2</sup> In the fifth circuit rule 32 is amended as follows:—"Provided that in all cases entitled to prece-

### 33. CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

### 34. MODELS, DIAGRAMS AND EXHIBITS OF MATERIAL.

1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

2. All models, diagrams and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel

dence in this court under section 7 of the act approved March 3, 1891, the mandate or other proper process may be issued by the clerk after the expiration of seven days from the date of the rendition of the decree of this court, unless otherwise ordered by the court or one of the judges thereof."

In the sixth circuit rule 32 is amended by adding:—"Such mandate shall not issue until time has elapsed for filing a petition to rehear as defined by rule 29; and no man-

date or other process of *procedendo* shall issue when a petition to rehear is pending, unless specially ordered."

In the eighth circuit, by an order entered February 20, 1898, the clerk is directed to issue a mandate or other proper process to the court below in all cases sixty days after the final disposition thereof, excepting cases dismissed under the provisions of rule 20, and section 1 of rule 16, and except in cases where it shall be otherwise expressly ordered.

in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

In the circuit court of appeals for the fifth circuit the following additional rule was adopted June 23, 1892:

**35. ORDER IN RELATION TO ASSIGNMENT OF CASES FOR HEARING.**

Thirty days prior to the opening of the regular session of the court, the clerk is directed to assign cases for hearing during the first month of the term at the rate of two cases per day for the first three days of each week. Any cases entitled by law to preference in hearing shall be first assigned, and thereafter causes shall be grouped by States and assignments made, so as to permit the hearing of causes from one State before the causes from the next State in order shall be called.

In the seventh circuit the following additional rule was adopted October 8, 1891:<sup>1</sup>

**CLERK'S REPORTS.**

The clerk shall keep an accurate account of all moneys received by him for fees in cases pending in the court, and shall deposit the same in a national bank to be designated by the senior circuit judge. And as often as once in three months he shall submit to the court a detailed report, showing all moneys received by him for fees since the last report, and all moneys paid out, if any.

In the ninth circuit the following additional rule was adopted July 29, 1892:

**35. ASSIGNMENT OF CAUSES FOR HEARING.**

Thirty days prior to the opening of any session or meeting of the court the clerk is directed to assign causes for hearing at the rate of one case per day for the first five days of each

<sup>1</sup> On the same date rules 23, 26 and provisions of those rules. See rule 27 were superseded by a new rule 23, n., at p. 1062, *supra*, which amended and consolidated the

week. Causes shall be grouped by States, and assignments made, so as to permit the hearing of causes from one State before the causes from the next State in order shall be called; causes from the northern district of California shall be assigned for hearing last. Any causes entitled by law to preference in hearing shall be first assigned and take precedence over other causes from the same State. [Adopted July 29, 1892.]

## APPENDIX IV.

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### RULES OF PRACTICE IN EQUITY.

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#### PRELIMINARY REGULATIONS.

1. The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to hearing of all causes upon their merits.

2. The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

3. Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

4. All motions, rules, orders and other proceedings, made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in



an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office-hours to the free inspection of the parties in any suit in equity and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders or other proceedings not requiring personal service on the parties, in their discretion.

5. All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded, by any judge of the court, upon special cause shown.

6. All motions for rules or orders and other proceedings which are not grantable of course or without notice shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

## PROCESS.

7. The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8. Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

9. When any decree or order is for the delivery of possession upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10. Every person not being a party in any cause who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and

every person not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

#### SERVICE OF PROCESS.

11. No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

12. Whenever a bill is filed the clerk shall issue the process of subpoena thereon as of course upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there is more than one defendant a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

13. The service of all subpoenas shall be by a delivery of a copy thereof, by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

14. Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.

15. The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case the person serving the process shall make affidavit thereof.

16. Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

17. The appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

#### BILLS TAKEN PRO CONFESSO.

18. It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court upon motion for that purpose, to file his plea, demurrer or answer to the bill in the clerk's office on the rule-day next succeeding that of entering his appearance. In default thereof the plaintiff may, at his election, enter an order (as of course) in the order-book that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

19. When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant. And no such motion shall be granted unless upon the payment of the

cost of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct. for the purpose, of speeding the cause.

#### FRAME OF BILLS.

20. Every bill in the introductory part thereof shall contain the names, places of abode and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that," etc.

21. The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

22. If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties

thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

23. The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

24. Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit in the manner in which it is framed.

25. In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

#### SCANDAL AND IMPERTINENCE IN BILLS.

26. Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him,

the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

27. No order shall be made by any judge for referring any bill, answer or pleading, or other matter or proceeding, depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

#### AMENDMENT OF BILLS.

28. The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill in any matter whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

29. After an answer or plea or demurrer is put in, and be-

fore replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

30. If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

#### DEMURRERS AND PLEAS.

81. No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

82. The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

83. The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant,



they shall avail him as far as in law and equity they ought to avail him.

34. If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

35. If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

36. No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

37. No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

38. If the plaintiff shall not reply to any plea or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

#### ANSWERS AND DISCOVERY.

39. The rule, that if the defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be en-

titled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser for a valuable consideration, without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

40. A defendant shall not be bound to answer any statement or charge in the bill, unless especially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

DECEMBER TERM, 1850.

*Ordered*, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill unless the complainant desires to do so to obtain a discovery.

41. The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered

respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

DECEMBER TERM, 1871.

[Amendment to 41st Equity Rule.]

If the complainant in his bill shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 8 of the act of congress of July 2, 1864.

42. The note at the foot of the bill specifying the interrogatories which each defendant is required to answer shall be considered and treated as part of the bill, and the addition of any such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

43. Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words, "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say:—

"1. Whether, etc.

"2. Whether, etc."

44. A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

45. No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

46. In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

#### PARTIES TO BILLS.

47. In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

48. Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

49. In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, on consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

50. In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him.

51. In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

52. Where the defendant shall by his answer suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

53. If a defendant shall, at the hearing of a cause, object

that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

54. Where no account, payment, conveyance or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

#### INJUNCTIONS.

55. Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place.

#### BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56. Whenever a suit in equity shall become abated by the oath of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and upon suggestion of the facts the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall

be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

57. Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or, for any other reason, a supplemental bill or a bill in the nature of a supplemental bill may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by the judge of the court.

58. It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

#### VERIFICATION OF ANSWERS.

[As amended in October Term, 1888: 129 U. S. 701.]

59. Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory, or before any notary public.

Amendment promulgated March 5, 1889: 129 U. S. 701.

#### AMENDMENT OF ANSWERS.

60. After an answer is put in, it may be amended as of course in any matter of form, or by filling up a blank or correcting a date, or reference to a document, or other small matter, and be resworn at any time before a replication is put in or the cause is set down for a hearing upon bill and answer. But after replication or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original

statements, except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

#### EXCEPTIONS TO ANSWERS.

61. After an answer is filed on any rule-day the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

62. When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers or other proceedings were necessary or proper, and ought not to have been joined together.

63. Where exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

64. If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer



thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

65. If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

#### REPLICATION AND ISSUE.

66. Whenever the answer of the defendant shall not be accepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

#### TESTIMONY AND DEPOSITIONS.

67. After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse

party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleading.

Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; *provided*, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skilful stenographer or by a skilful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; *provided*, that such stenographer or typewriter has been appointed by the court, or is approved by both parties. The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; *provided*, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. The examiner may, upon all examinations, state any special matters to the court as he shall think

fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the court in term time or to a judge in vacation, for special reasons satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause unless by agreement of the parties or by leave of court first obtained on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

[As amended May 8, 1892.]

[The amendment of May 3, 1892, repealed the following amendments to rule 67]:

DECEMBER TERM, 1854.

*Ordered*, That the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.

[Included in amendment of May 3, 1892.]

DECEMBER TERM, 1861.

*Ordered*, That the last paragraph in the sixty-seventh rule in equity be repealed, and the rule be amended as follows:— Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted, as near as may be, in the mode now used in common-law courts. The depositions taken upon such oral examinations shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and, when completed, shall be read over to the witness, and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, im-

material or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in the thirtieth section of act of congress, September 24, 1789.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

[Thus amended May 11, 1891: 189 U. S. 707. Repealed except in so far as included in amendment of May 8, 1892.]

[Amendment to 67th Rule of December Term, 1869. As amended October Term, 1890, May 11, 1891: 189 U. S. 707.]

Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the 67th General Rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained, on motion for cause shown. The expense of the taking down of depositions by a stenographer, and of putting them into typewriting or other writing, shall be paid in the first instance by the party who

makes the examination or cross-examination of the witness, as the case may be, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

[Repealed except in so far as included in amendment of May 3, 1892.]

OCTOBER TERM, 1892.

It is ordered that Equity Rule 67, as promulgated May 2, 1892, be and it is hereby amended by adding thereto the following:—Upon due notice given as prescribed by previous order, the court may at its discretion permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing.

[Promulgated May 15, 1893: 149 U. S. 798.]

68. Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

69. Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office by any judge of the court upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances; but by consent of the parties publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order-books or indorsed upon the deposition or testimony.

70. After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or

that any of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners, as the judge of the court may direct, to take the examination of such witness or witnesses *de bene esse* upon giving due notice to the adverse party of the time and place of taking his testimony.

71. The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered and stated in substance, thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination of the matters in question in this case? If yea, set forth the same fully and at large in your answer?"

#### CROSS-BILLS.

72. Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing in the same manner and under the same restrictions as the answer praying relief may now be read and used.

#### REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

73. Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

74. Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party

shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

75. Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.

76. In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination or answer shall be identified, specified and referred to so as to inform the court what state of facts, charge, affidavit, deposition, examination or answer were so brought in or used.

77. The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the acts of congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in



the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

78. Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master or examiner requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master or examiner, an attachment may issue thereupon by order of the court or of any judge thereof in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

79. All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

80. All affidavits, depositions and documents which have been previously made, read or used in the court, upon any proceeding in any cause or matter, may be used before the master.

81. The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

82. The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but, when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if upon notice thereof he does not pay it within the time prescribed by the court.

#### EXCEPTIONS TO REPORT OF MASTER.

83. The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed they shall stand for hearing before the court, if the court is then in session; or if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.

84. And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs, the costs to be fixed in each case by the court by a standing rule of the circuit court.

#### DECREEES AND ORDERS.

85. Clerical mistakes in decrees or decretal orders, or errors arising from any incidental slip or omission, may, at any time before the actual enrolment thereof, be corrected by order of

the court, or a judge thereof, upon petition, without the form or expense of a rehearing.

86. In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows:—"This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:" [Here insert the decree or order.]

#### GUARDIANS AD LITEM.

87. Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

#### REHEARINGS.

88. Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

#### GENERAL PROVISIONS.

89. The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

90. In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

91. Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

DECEMBER TERM, 1868.

92. *Ordered*, That in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

OCTOBER TERM, 1878.

INJUNCTIONS.

93. When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

## OCTOBER TERM, 1881.

## STOCKHOLDERS' BILLS.

94. Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on a right which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action.

## APPENDIX V.

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### FORMS AND PRECEDENTS.

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#### *Bill for the Foreclosure of a Railway Mortgage.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS IN THE EIGHTH CIRCUIT.

IN EQUITY.

*To the Honorable the Judges of the Circuit Court of the United States for the District of Kansas in the Eighth Circuit, sitting in Equity:*

The Mercantile Trust Company, a corporation created by and existing under the laws of the State of New York, brings this its bill of complaint against the Missouri, Kansas and Texas Railway Company, a corporation created and existing under and by virtue of the laws of the State of Kansas, and the Missouri Pacific Railway Company, a corporation existing under the laws of said State and of the State of Missouri, as hereinafter set forth.

And thereupon your orator complains and says that the Mercantile Trust Company is a corporation created by and existing under the laws of the State of New York, and having its principal office for the transaction of its business in the city of New York in said State of New York, and is a citizen of said State of New York, within the meaning of the laws fixing and determining the jurisdiction of this honorable court.

And your orator further shows, upon its information and belief, that on and prior to the 1st day of December, 1880, there existed a railroad corporation known as the Missouri, Kansas and Texas Railway Company, which was created a body corporate by the consolidation, amalgamation and purchase of the property and franchises of certain other corporations, created by and existing under and by virtue of the laws of the States of Kansas and Missouri, and possessed of and endowed with powers, rights, privileges, franchises and immunities granted by the laws of said States, and also by certain acts of the congress of the United States, and acts of the legislature of the State of Texas. That said Missouri, Kansas and Texas Railway Company owned and operated a number of lines of railway situate in the States of Missouri, Kansas and Texas, and in the Indian Territory, with branches extending in various directions within such States and Territory, and then had and still has its principal office for the transaction of its business in the

city of Parsons in the said State of Kansas; and was and is a citizen of said State of Kansas, within the meaning of the laws fixing and determining the jurisdiction of this honorable court.

And your orator further shows unto your honors that heretofore and on or about the 1st day of December, 1880, the said Missouri, Kansas and Texas Railway Company, being thereunto duly authorized, by its president and secretary and under its corporate seal, made and executed its forty-five thousand bonds, known as General Consolidated Mortgage Bonds, numbered consecutively from 1 to 45,000, both numbers inclusive, each for the sum of \$1,000, bearing date on said 1st day of December, 1880, by the terms of which bonds the said company promised to pay to the holder of each bond, or, in case the same should be registered, then to the registered owner thereof, the sum of \$1,000, United States gold coin, of or equal to the then standard of value, at its financial agency in the city of New York, forty years after the date of said bond, and also interest thereon at the rate of six per centum per annum, payable semi-annually, in like gold coin, on the 1st days of June and December in each year, on the presentation and surrender of the respective interest coupons annexed to said bonds at the financial agency aforesaid.

And your orator further shows unto your honors that on or about said 1st day of December, 1880, the said Missouri, Kansas and Texas Railway Company, being the owner of or having an interest in, by way of lease or otherwise, and being in possession of, the lines of railway and property therein described, did, in order to secure the payment of the principal and interest of the said issue of General Consolidated bonds, as the same should mature, make, execute and deliver to your orator a certain deed or indenture of trust or mortgage, known as its General Consolidated Mortgage, whereby it conveyed to your orator as trustee, and its lawful successor or successors in the trust thereby created, and assigns, all the right of way and railroad and other property of the said Missouri, Kansas and Texas Railway Company particularly described in said mortgage, with the exceptions therein noted, which property is by said mortgage more particularly described as follows, to wit:—

“*First.*— All and singular the railroad, as the same is constructed and operated, extending from Junction City, in Davis county, and State of Kansas, down the valley of the Neosho river, through the counties of Davis, Morris, Lyon, Coffee, Woodson, Allen, Neosho and Labette, to a point on the southern boundary line of said State, between the Neosho river and the western boundary of Labette county, a distance of one hundred and eighty-two miles, more or less.

“And also all the right, title and interest which the party of the first part has, by reason of the construction of said line of road, to and in any land or lands heretofore conveyed by any act of congress to the State of Kansas to aid such construction, the said lands being the same, or so much thereof as remain unsold at the date hereof, which were granted by acts of congress to the State of Kansas, and by said State to the Union Pacific Railway, Southern Branch, as set forth in the said mortgage executed by the party of the first part to the Union Trust Company, bearing date February 1, 1871, to which reference is hereby made, and also all the right, title and interest

of the said party of the first part in and to the proceeds of such of said lands as may have been sold, which heretofore belonged to the said railway company, or in which the said company was in any way interested, and which are now unexpended and unapplied; and also all the right, title and interest of the said party of the first part in and to any proceeds of lands granted to the State of Texas by act of congress entitled 'An act to appropriate the proceeds of the sale of public lands, and to grant pre-emption rights,' approved September 4, 1841, and heretofore sold by said State, under and by virtue of an act of the legislature of the State of Kansas entitled 'An act providing for the sale of public lands to aid in the construction of certain railroads, approved February 23, 1866; and also all the right, title and interest of the party of the first part in and to such of the lands granted by the act of congress aforesaid which were heretofore sold and conveyed by the State of Kansas to the Land Grant Railway and Trust Company, and by said company to the party of the first part, together with all and singular the tenements, hereditaments, rights, privileges, easements, income, advantages and appurtenances to the said lands and premises belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title and interest, property, claim and demand whatsoever, at law or in equity, of the said party of the first part, of, in and to the same, and any and every part or parcel thereof situate in the State of Kansas.

"*Second.*— Also all and singular the said line of railroad, constructed and operated from the southern boundary line of the State of Kansas, southerly through the Indian Territory, to the southern boundary line of the State of Texas, to a point at or near the town of Denison, in said State, a distance of two hundred and fifty miles, more or less, and also all the right, title and interest which the party of the first part now has or may hereafter acquire by reason of constructing the extension of the said line of railroad through the Indian Territory, in and to any lands granted by the acts of congress aforesaid, or which the said party of the first part now has or may hereafter acquire under and by virtue of a treaty or treaties from any Indian nation or tribe, or otherwise, howsoever, appertaining to the aforesaid extension, together with all the rights, privileges, tenements, hereditaments and appurtenances that may belong or appertain thereto; the land granted under said acts of congress being ten alternate sections of land on each side of said railroad.

"*Third.*— All and singular the railroad, as the same is now constructed, extending from Sedalia, in Pettis county, in the State of Missouri, to the western boundary of said State, a distance of one hundred miles, more or less, being the railroad acquired by the party of the first part by purchase from the Tebo and Neosho Railroad Company, as hereinbefore mentioned.

"*Fourth.*— All and singular the railroad which the party of the first part acquired from the Labette and Sedalia Railway Company, which is now constructed from the town of Parsons, in Labette county, in the State of Kansas, on the main line of the railroad of the party of the first part, northeasterly through Labette, Neosho, Crawford and Bourbon counties, to the boundary line, where the same intersects the railroad acquired by the said



party of the first part from the Tebo and Neosho Railroad Company as aforesaid, a distance of sixty-one miles, more or less.

"*Fifth.*—All and singular the railroad constructed from the town of Holden, on the Missouri Pacific Railroad, in the county of Johnson, State of Missouri; thence into and through the municipal township of Camp Branch, and into and through the municipal township of Grand River, and into and through the corporate limits of the city of Harrisonville, in Cass county; and thence to the western boundary line of the State of Missouri, in the direction of the town of Paola, in the State of Kansas, a distance of about thirty-eight miles, subject to the existing lease thereof to the Missouri Pacific Railway Company, together with all lands, tenements and hereditaments acquired or to be acquired for rights of way for the said portion of railroad hereby conveyed, and all the appurtenances thereto belonging, and also all lands acquired and appropriated, or to be acquired and appropriated, for depots, superstructures, buildings, erections and fixtures on the said line of railroad, and all tracks, bridges, viaducts, culverts, fences and all houses and buildings thereon or appertaining thereto.

"*Sixth.*—So much of the line of railway heretofore belonging to the Neosho Valley and Holden Railway Company, and heretofore consolidated and made one corporation with and under the name of the party hereto of the first part, as extends from the point on the eastern boundary line of the State of Kansas where the railway last above mentioned crosses said boundary line from Cass county, Missouri, to the town of Paola, Kansas, a point on the line of said road distant fifteen miles westerly from said boundary line, subject to the lease last aforesaid mentioned, together with all lands, tenements and hereditaments acquired or to be acquired for rights of way for the said portion of the railroad hereby conveyed, and all appurtenances thereto belonging, and all lands acquired and appropriated, or to be acquired or appropriated, for depots, superstructures, buildings, erections and fixtures on the said line of railroad, and all tracks, bridges, viaducts, culverts, fences, and all houses and buildings thereon or appertaining thereto.

"*Seventh.*—All and singular the railroad of the party hereto of the first part, now constructed and in operation, extending from Sedalia in the State of Missouri, northerly to Moberly in said State, a distance of seventy-two miles, being a part of the railroad of the Tebo and Neosho Railroad Company, conveyed to the said party of the first part, more particularly described in the first additional mortgage made by the party of the first part to the Union Trust Company, dated June 1, 1873, to which reference is hereby made, together with all the rights, powers, privileges and franchises belonging or in anywise appertaining thereto.

"*Eighth.*—The entire railroad of and belonging to the said party of the first part, situate, lying and being and extending from its eastern terminus in the city of Hannibal in the State of Missouri, westerly through the counties of Marion, Ralls and Monroe, to the town of Moberly in the county of Randolph, as the same has been heretofore and is now constructed, maintained and operated, being seventy miles in length.

"And also all lands and real estate of every kind and nature, and where-soever the same may be situate, of or belonging to the said party of the first part, and owned, used, occupied and enjoyed in the construction, mainte-

nance and operation of said last-described railroad, together with all depots, station-houses, freight-houses, car-houses, machine shops, cattle-yards, all other buildings, erections, tenements, structures and fixtures, and all machinery, tools, rails, ties, tracks, bridges, viaducts, culverts, fences, or other constructions or superstructures to the said railroad belonging or appertaining thereto.

"All of the aforesaid described railroads taken together being about seven hundred and eighty-six miles in length.

"Any lands or land scrip certificates to which the party of the first part is or may hereafter be entitled, or shall receive by reason of the construction of railroad in Texas, are not covered of this indenture or the lien thereof, but may be sold by said party of the first part, which party, however, hereby covenants to use the proceeds of any such sale strictly in payment of the interest or principal of the bonds issued under and secured by this indenture.

"*Ninth*.— And also all the following property, real and personal, now owned, or which may be at any time hereafter acquired, by the party of the first part, for the use of any or all of the railroads above described, namely, all the lands, tenements and hereditaments, and right of way, and all lands appropriated for depots, superstructures, buildings, erections and fixtures; and also all tracks, bridges, viaducts, culverts, fences and other structures, depots, engine-houses, car-houses, freight-houses, wood-houses, and other buildings; and all machine-shops and other shops; and also all locomotives, tenders, cars and other rolling-stock or equipments, and also all machinery, tools, implements, fuel, supplies and materials for constructing, operating, repairing or replacing the said railroads, or any or either of them; and also all corporate and other franchises, powers, rights and privileges now held and owned by the party of the first part, pertaining to the said seven hundred and eighty-six miles of constructed road.

"And whereas, the party of the first part, under and by virtue of the laws of the States of Kansas, Missouri and Texas, and the aforesaid acts of congress of July 25th and 26th, 1866, is entitled to build or acquire by purchase, consolidation or otherwise, extensions and branches of its said road in the said States and in the Indian Territory.

"And whereas, the party of the first part, under the act of the Texas legislature passed August 2, 1870, is authorized to extend its railroad from its present terminus at Denison through the State of Texas to the Rio Grande river, with a view of extending the same to the City of Mexico, and has also the right to construct branches in the said State of Texas, by virtue of said last-mentioned act, and the right to purchase joint stocks and unite or consolidate with any connecting railroad company with the approval and consent of a majority in interest of the stockholders, and to acquire and merge into itself all or any part of the property, rights and privileges and franchises of such other company as therein provided.

"And whereas, the said party of the first part has resolved to extend its line to the Rio Grande, either by direct or sole construction on its own account, or by joint construction or arrangement with other companies as may be found most expedient, and likewise to build or acquire other branches and extensions in Texas and elsewhere.

"And whereas, franchises pertaining to road not now constructed are not embraced in the said mortgages of February 1, 1871, and April 1, 1876, which point has been adjudged and decided by the United States circuit court for the district of Kansas.

"And whereas, to provide for the means for building and acquiring such branches and extensions, an issue of bonds, to be secured by this indenture, at the rate of not exceeding twenty thousand dollars per mile of road, has been authorized by the board of directors and by the stockholders of the party of the first part at the meetings hereinbefore referred to:

"Now, therefore, the said party of the first part (in addition to the seven hundred and eighty-six miles of road hereinbefore particularly described, in respect to which the said mortgages of February 1, 1871, and April 1, 1876, to the extent of all valid and subsisting indebtedness thereunder, or authorized thereby, are prior in lien to this indenture) doth, by these presents, grant, bargain, sell, assign, transfer and convey unto the said party of the second part herein, all of its franchises under the said Texas act of August 2, 1870, before referred to, in respect to the line of road to be constructed or acquired from the existing terminus of its road at Denison to the Rio Grande, and all branches which it is authorized or may hereafter be authorized to construct in the State of Texas, and in the Indian Territory, and in the States of Missouri, Kansas and elsewhere, and all and singular its railroads and branches, to be constructed or acquired under its existing charters, constituent acts, or any amendments thereof, and also including in the grant and conveyance herein and hereby made all roads now owned by it and all that it may hereafter own, whether built by itself or acquired by purchase, consolidation or otherwise, and all leasehold rights which may be acquired in other roads, under contracts for the sole or joint use thereof by the party of the first part, and also all the lands, tenements and hereditaments acquired or appropriated, or which may hereafter be acquired or appropriated, for the purpose of a right of way for said railroad, its extensions and branches, and all the easements or appurtenances thereto belonging or in anywise appertaining, and all railways, ways and right of way, depot grounds, tracks, bridges, viaducts, culverts, fences and other structures, depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, warehouses, machine-shops, work-shops, superstructures, erections and fixtures, whether now held or hereafter at any time acquired for the use of said railroad, its extensions and branches, or in connection therewith, or the business thereof, also all locomotives, tenders, cars and other rolling-stock of equipments, and all rails, ties, chairs and machinery, tools, implements, fuel and materials whatsoever, for or in respect of the constructing, operating, repairing or replacing said railroad, or any part thereof, whether now held or owned or hereafter to be acquired by the said party of the first part, together with all the equipments or appurtenances whatsoever thereunto belonging, whether now held or hereafter acquired, and all franchises connected with or relating to said railroad, its extensions and branches, or the construction, maintenance or use thereof, now held or hereafter acquired by the party of the first part, and all corporate franchises of any nature relating thereto, including the franchise to be a corporation and operate said railroad, which are now or may hereafter

be possessed or exercised by the party of the first part, together with all and singular the endowments, income and advantages, tenements and hereditaments and appurtenances to the above-mentioned railroad premises or property belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, in law as well as in equity, present or prospective, of the said party of the first part, or in and to the same and every part and parcel thereof, with the appurtenances."

But your orator further shows unto your honors that it was expressly provided in and by said General Consolidated Mortgage that while the bonds therein stated, issued under and by virtue of the mortgages made by the Union Pacific Railway Company, Southern Branch, on the 14th of November, 1868, to Russell Sage and N. A. Cowdrey, trustees, and in the mortgage made by the said Missouri, Kansas and Texas Railway Company to the said Union Trust Company, dated February 1, 1871, were outstanding and unpaid, the lands in said mortgages described, or any part thereof, might be sold in accordance with the provisions in said mortgages contained and the proceeds applied to the payment of the bonds secured thereby, the same as if the General Consolidated Mortgage had not been made. But that when the bonds secured by said two mortgages had been fully paid, retired or canceled, and the mortgages were satisfied, then and in such case all the provisions of the ninth article of the mortgage of February 1, 1871, should be considered and taken to be a part of the General Consolidated Mortgage, as fully to all intents and purposes as if it had been incorporated therein, substituting, however, your orator or its successor in place of said Union Trust Company.

And your orator further shows that after said mortgage was made the Missouri, Kansas and Texas Railway Company did construct and acquire certain lines of railroad in the State of Texas, and did expend and use in and about the construction and acquisition thereof large amounts of bonds secured by said General Consolidated Mortgage and proceeds of the sales of such bonds, and that the lines of railroad so constructed and acquired, and which are hereinafter more particularly mentioned, thereupon became and now are subject to the lien of the said last-mentioned mortgage.

And your orator further shows unto your honors that a true and correct copy of the said General Consolidated Mortgage is annexed to this bill of complaint and marked Exhibit A, and your orator prays that the same may be taken as a part of this bill as fully as if embodied herein. That the execution of said General Consolidated Mortgage to secure the payment of said issue of bonds was duly authorized by the board of directors of the said railway company and was further authorized by the stockholders of said railway company at two several meetings held respectively on the 19th of May, 1880, and the 17th day of November, 1880. That said General Consolidated Mortgage was duly executed, acknowledged and recorded as required by law.

And your orator further shows unto your honors that it was provided and covenanted in by said General Consolidated Mortgage that of the bonds authorized to be issued as aforesaid, and when issued to be secured by the

provisions of said mortgage, bonds numbered from 1 to 18,217, both numbers inclusive, should be certified by the trustee thereunder, or its successor or successors in said trust, only in exchange for outstanding issues of bonds under prior mortgages which were a lien upon the said railroad of the said party of the first part thereto, or upon some part thereof.

And your orator further shows unto your honors that of the bonds so authorized to be issued as aforesaid and numbered from 1 to 18,217, both numbers inclusive, no bonds have been certified and delivered by your orator as trustee under said mortgage, and none of such bonds are now actually issued and outstanding.

And your orator further shows unto your honors that in and by section sixth of said General Consolidated Mortgage it was provided that bonds numbered from 18,218 to 28,217, both numbers inclusive, amounting in the aggregate to \$10,000,000, were set apart and reserved for retiring upon such plan and terms as should be adopted by the board of directors of the said railway company, the income bonds issued or which might be issued under the mortgage of April 1, 1876, made by said railway company to the Union Trust Company as trustee, and the coupons and scrip certificates representing interest accrued upon such bonds.

And your orator further shows unto your honors that by the terms of a resolution of the board of directors of the said railway company, passed in pursuance of the provisions of said section sixth, it was provided that the bonds issued in exchange for such income bonds, coupons and scrip certificates should bear interest at and after the rate of five per cent. per annum.

And your orator further shows unto your honors that of the bonds so authorized to be issued by said section sixth, bonds numbered from 18,218 to 27,591, both numbers inclusive, amounting in the aggregate to \$9,874,000, have been actually issued and are now outstanding in the hands of *bona fide* holders thereof.

And your orator further shows unto your honors that by the terms of said General Consolidated Mortgage it was provided that bonds numbered from 28,218 to 30,217, both numbers inclusive, amounting in the aggregate to \$2,000,000, might be issued and used for the purpose of providing for new equipment and rolling-stock.

And your orator further shows unto your honors that by the terms of said General Consolidated Mortgage it was further provided that the remaining bonds numbered from 30,218 to 45,000, both numbers inclusive, were to be issued and used in securing the construction and acquisition of extensions and branches of said railway in the States of Missouri, Kansas, Texas and the Indian Territory, and elsewhere.

And your orator further shows unto your honors that it was provided in and by said General Consolidated Mortgage that the said railway company might, upon the conditions therein set forth, issue bonds to be secured by said mortgage, in addition to the \$45,000,000 of bonds provided for therein, at the rate per mile specified in said mortgage.

And your orator further shows unto your honors that by virtue of the covenants and provisions of said General Consolidated Mortgage, and under the authority therein granted, the said railway company has made, issued, executed and delivered, and your orator as trustee under said mortgage

has certified and delivered, bonds numbered from 28,218 to 46,496, both numbers inclusive, amounting in the aggregate to \$18,278,000, all of which are now actually outstanding in the hands of *bona fide* holders thereof.

And your orator further shows unto your honors that in accordance with the action in that regard contemplated by said General Consolidated Mortgage, and in order to better carry out the intention thereof and the intention of the provisions therein contained, the said railway company has made, executed and delivered to your orator, as trustee, certain supplemental mortgages as follows :

1. A mortgage dated the 1st day of March, 1882, wherein and whereby it conveyed to your orator, upon the conditions and covenants contained in said General Consolidated Mortgage, the property in said supplemental mortgage described.

A true and correct copy of said supplemental mortgage is annexed to this bill of complaint and marked Exhibit B, and your orator prays that the same may be taken as a part of this bill as fully as if embodied herein.

2. A mortgage dated the 1st day of December, 1886, wherein and whereby it conveyed to your orator, upon the conditions and covenants contained in said General Consolidated Mortgage, the property in said supplemental mortgage described.

A true and correct copy of said supplemental mortgage is annexed to this bill of complaint and marked Exhibit C, and your orator prays that the same may be taken as a part of this bill as fully as if embodied herein.

3. A mortgage dated the 1st day of December, 1887, wherein and whereby it conveyed to your orator, upon the conditions and covenants contained in said General Consolidated Mortgage, the property in said supplemental mortgage described.

A true and correct copy of said supplemental mortgage is annexed to this bill of complaint and marked Exhibit D, and your orator prays that the same may be taken as a part of this bill as fully as if embodied herein.

And your orator further shows that said railway company, in and by said General Consolidated Mortgage, expressly granted, bargained, sold, assigned, transferred and conveyed to your orator, in addition to the property herein particularly described, all and singular its railroad and branches, to be constructed or acquired under its existing charters, constituent acts or any amendments thereof, and also including in the grant and conveyance therein and thereby made all roads then owned by it or all that it might thereafter own, whether built by itself or acquired by purchase, consolidation or otherwise, and also all leasehold rights which might be acquired in other roads, and all rights acquired, or to be acquired, in other roads under contract for the sole or joint use thereof by the said railway company, and that the said railway company thereby agreed to execute and deliver to your orator, as trustee, or its successor or successors, any further reasonable and necessary trust deed, to bring in and make subject to the conditions of said mortgage every such extended or future-acquired road, and every other land and property, real or personal, that might thereafter be acquired by it, for the purpose, and with the intent, of securing the payment of the bonds, composing every increased issue, as well as the bonds therein described, equally and alike upon the property of the said railway company, and the interest

due, and to grow due thereon, in the same manner as if said bonds had been originally secured by one and the same indenture.

And your orator further shows unto your honors, upon its information and belief, the said defendant, the Missouri, Kansas and Texas Railway Company, since the execution of the said mortgage, has acquired, as absolute owner thereof, ninety-seven thousand, two hundred and eighty-four shares of the capital stock of the International and Great Northern Railroad Company, a corporation organized and existing under the laws of the State of Texas.

And your orator further shows unto your honors that on or about the 1st day of June, 1881, the said International and Great Northern Railroad Company, being thereto duly authorized, made, executed and delivered to the defendant, the Missouri, Kansas and Texas Railway Company, a certain indenture in the nature of a lease, wherein and whereby it leased to the said Missouri, Kansas and Texas Railway Company all its property, the railroad and branches of the said International and Great Northern Railway Company in the State of Texas as therein particularly described, to which said indenture of lease or a copy thereof, when produced, your orator begs leave to refer for the contents thereof, as fully as if the same had been embodied and made part of this bill.

And your orator further shows unto your honors that your orator is informed and believes that by the intention and operation of the terms and covenants contained in said General Consolidated Mortgage the said shares of the capital stock of the said International and Great Northern Railway Company, and all right, title, interest, claim, property or possession to the said Missouri, Kansas and Texas Railway Company acquired in, under and by virtue of the ownership of said shares of the capital stock, and in, under or by virtue of said indenture of lease dated the 1st day of June, 1881, immediately became and was and continued to be subject to the lien of said General Consolidated Mortgage, and became and was a part of the property which was pledged by operation of said General Consolidated Mortgage with your orator, as a further security for the payment of the principal and interest of the issue of bonds thereby secured.

And your orator further shows unto your honors that the said Missouri, Kansas and Texas Railway Company, since the date of the said General Consolidated Mortgage, has acquired by purchase, lease, or contract in the nature of lease, or by construction or otherwise, divers other lines of railway and other appurtenant property, situated in the State of Texas and the Indian Territory, which said lines of railway, as your orator is informed, have become and now are subject to the lien of said mortgage as a first and paramount charge or incumbrance, and which said lines are situated and extend substantially as follows, to wit:

A line of railway from Denison to Greenville, 94 miles; from Denison to Gainesville, 50.20 miles; from Greenville to Mineola, 162.58 miles; from Echo to Belton, 7.15 miles; from Jeffersonville to McKinney, 153.50 miles; from Trinity eastwardly 67 miles; from Whitesboro southerly by way of Denton, Fort Worth, Hillsborough and Waco to Taylor, a distance of about 233.5 miles; from Dallas to Denton, 89 miles; from Taylor to the line of Colorado county, and from San Marcos to Lockhart, a distance of 102.75

miles; from Dallas to Greenville, 52 miles; from Gainesville to Henrietta, 70 miles; and as your orator is informed and believes, also a line of railway from at or near Bastrop to Lagrange, the length of which is unknown to your orator; and also branch lines in the Indian Territory of a total length of 18.80 miles, which, as your orator is informed and believes, extend from Atoka and McAllister, in said Territory, to the coal mines in the neighborhood thereof.

That the line of road from Taylor to Bastrop and from San Marcos to Lockhart, fifteen miles, and from at or near Bastrop easterly and to near Lagrange, was purchased by the Missouri, Kansas and Texas Railway Company from the Taylor, Bastrop and Houston Railway Company.

And your orator further shows unto your honors that in and by the terms of the resolution of the board of directors of the said defendant, the Missouri, Kansas and Texas Railway Company, hereinabove referred to, and under and by virtue of all the bonds issued under said General Consolidated Mortgage, bearing interest at five per cent per annum and issued in exchange for income bonds, scrip and coupon, it was further provided that all the income bonds received in exchange for the new five per cent bonds and the coupons and scrip so received in exchange for five per cent bonds should be deposited with your orator as trustee and held uncanceled as security for the new bonds until all the income bonds had been retired.

And your orator further shows unto your honors that under and by virtue of the terms of said resolution your orator has received and now holds uncanceled for the security of the new bonds, until all the income bonds have been exchanged, — dollars in par of said income bonds with coupons thereon from and after the coupon dated —, and coupons and scrip certificates detached from said bonds to the amount of — dollars.

And your orator further shows unto your honors that certain portions of the railroad owned by said railway company were at the time of the execution and delivery of said General Consolidated Mortgage incumbered by one or more mortgages or deeds of trust, made, executed and delivered by the defendant railway corporation, or by the respective corporations which owned said lines or portions of said railroad, prior to the time of the acquisition thereof by said Missouri, Kansas and Texas Railway Company.

That the mortgages or deeds of trust which at the time of the execution and delivery of said General Consolidated Mortgage were liens upon portions of the railway and equipment conveyed thereby are substantially as follows: —

1. A mortgage from the Union Pacific Railway Company (Southern Branch) to Russell Sage and N. A. Cowdrey, trustees, dated the 14th day of November, 1868, and bonds secured thereby to the amount of about \$3,067,000 are now outstanding. The said mortgage conveys the line of railroad therein mentioned and certain equipment appertaining thereto. And your orator refers to said mortgage, if and when the same shall be produced, for a full description of the property covered thereby.

2. A mortgage made by the Tebo and Neosho Railway Company to the Union Trust Company of New York, as trustee, dated 1st day of June, 1870, and bonds secured thereby to the amount of about \$347,000 are now outstanding. The said mortgage conveys the line of railroad therein mentioned



and certain equipment appertaining thereto. And your orator refers to said mortgage, if and when the same shall be produced, for a full description of the property covered thereby.

3. A mortgage made by the Missouri, Kansas and Texas Railway Company to the Union Trust Company of New York, as trustee, dated 1st day of February, 1871, and bonds secured thereby to the amount of about \$10,492,000 are now outstanding. The said mortgage conveys the line of railroad therein mentioned and certain equipment appertaining thereto. And your orator refers to said mortgage, if and when the same shall be produced, for a full description of the property covered thereby.

4. A supplemental mortgage made by said Missouri, Kansas and Texas Railway Company to the said Union Trust Company, dated 1st day of June, 1872, and bonds secured thereby to the amount of about \$2,498,000 are now outstanding. The said mortgage conveys the line of railroad therein mentioned and certain equipment appertaining thereto. And your orator refers to said mortgage, if and when the same shall be produced, for a full description of the property covered thereby.

5. A supplemental mortgage made by the said Missouri, Kansas and Texas Railway Company to the Union Trust Company of New York, as trustee, dated the 1st day of November, 1872, and bonds secured thereby to the amount of about \$1,182,000 are now outstanding. The said mortgage conveys the line of railroad therein mentioned and certain equipment appertaining thereto. And your orator refers to said mortgage, if and when the same shall be produced, for a full description of the property covered thereby.

6. A supplemental mortgage made by the Missouri, Kansas and Texas Railway Company to the Union Trust Company of New York, as trustee, dated the 1st day of June, 1873, and bonds secured thereby to the amount of about \$677,000 are now outstanding. The said mortgage conveys the line of railroad therein mentioned and certain equipment appertaining thereto. And your orator refers to said mortgage, if and when the same shall be produced, for a full description of the property covered thereby.

7. A mortgage from the said Missouri, Kansas and Texas Railway Company to the Union Trust Company of New York, as trustee, dated the 1st day of April, 1876, which said last-mentioned mortgage is known as the "second" or "income mortgage," and bonds secured thereby to the amount of about \$705,000 are now outstanding. The said mortgage conveys the line of railroad therein mentioned and certain equipment appertaining thereto. And your orator refers to said mortgage, if and when the same shall be produced, for a full description of the property covered thereby.

And your orator further shows unto your honors that on or about the 1st day of December, 1880, by an indenture or agreement dated on that day, made between the said Missouri, Kansas and Texas Railway Company and the Missouri Pacific Railway Company, said Missouri, Kansas and Texas Railway Company leased, demised and to farmletted unto the Missouri Pacific Railway Company its line of railway from Hannibal, in Marion county, Missouri, on the Mississippi river, via Moberly, Sedalia and Ft. Scott, to Parsons in Labette county, Kansas, three hundred and one miles, more or less, and also a line of railway from Junction City, in Davis county, Kansas, to the town of Parsons, in Labette county, Kansas; and thence extend-

ing southerly through the Indian Territory to the town of Denison, in Grayson county, Texas, four hundred and thirty-one miles, more or less; and also a line of road from Denison, in Grayson county, Texas, southeasterly to the town of Greenville, in Hunt county, Texas, a distance of fifty-two miles, more or less; and also a line of road extending from said town of Denison westerly to Gainesville, in Cook county, Texas, forty-two miles, more or less, to and for the full end and term of ninety-nine years from the date of said indenture of lease, fully to be completed and ended.

And your orator further shows unto your honors that in and by the terms of said lease it was made expressly subject and inferior to the lien of the existing mortgages upon the property of said railway company, and especially to the lien of the General Consolidated Mortgage executed as aforesaid by the Missouri, Kansas and Texas Railway Company to your orator as trustee.

And your orator further shows unto your honors that said lease was intended to and by its terms did extend to and cover, subject as aforesaid to the lien of the mortgages executed by the Missouri, Kansas and Texas Railway Company, any extensions or further constructed railway of said Missouri, Kansas and Texas Railway Company.

And your orator is informed and believes, and therefore shows unto your honors, that the said Missouri Pacific Railway Company has, or claims to have, by virtue of said lease, some claim in and to or lien upon the railway of said Missouri, Kansas and Texas Railway Company, which lien or claim, if any it has, is subject and inferior to the lien of the General Consolidated Mortgage so as aforesaid executed and delivered to your orator.

And your orator further shows unto your honors that on the 1st day of June, 1888, there became due and payable and accruing upon the bonds secured by said General Consolidated Mortgage, and then actually outstanding, the semi-annual instalment of interest, evidenced by the coupons attached to said bonds, amounting to the sum of \$771,645. That default was made in the payment of the interest on said bonds and said instalment of interest accruing on said bonds as aforesaid. That the said Missouri, Kansas and Texas Railway Company wholly failed, omitted and refused to pay the said instalment of interest and to pay the interest mentioned and provided for in the said coupons due on said last-mentioned day, or upon any of them, but therein wholly made default; that a large number of said coupons, representing interest due and payable upon the said 1st day of June, 1888, were on that day actually presented for payment at the place where the same were and are payable, to wit, at the financial agency of the said Missouri, Kansas and Texas Railway Company in the city of New York, and payment thereof was demanded and refused. And your orator shows further that on said 1st day of June said railway company also made default in payment of interest then due on bonds secured by mortgage hereinbefore mentioned, known as the Tebo and Neosho mortgage, and which constitutes a lien on part of the property covered by said General Consolidated Mortgage.

And your orator further shows unto your honors that the holders of a large amount in value of said General Consolidated Mortgage bonds now actually outstanding have in writing requested your orator to enforce the remedies provided in said mortgage or deed of trust.

And your orator further shows unto your honors that it is informed and believes that said railway company is insolvent and unable to pay its floating debt and current and presently accruing indebtedness, and the taxes which have been levied and assessed upon the property of said railway company by the municipal and State authorities, or some of them, having authority to levy and assess such taxes, and that some portion at least of the property of said railway company covered by said mortgage has been advertised for sale as required by law in order to meet the payment of such taxes so levied and assessed upon its property and in default.

That as your orator is informed and believes there will presently become due a large amount on account of wages, labor and current expenses of said railway company, which the said railway company is wholly unable to pay, and that the mortgaged property is insufficient and inadequate security for the payment of the outstanding bonds secured by said General Consolidated Mortgage after providing for the payment of liens prior thereto and of preferred claims.

That there is great danger that the property of said defendant railway company, or some part of it, may be sold in order to pay the taxes so levied and assessed upon it, and which are now in default, or that judgments may be recovered against it for the floating indebtedness now due or which will shortly become due, and that the property of said railway company may be sold under such judgments so to be recovered as aforesaid, and that the property and lines of said Missouri, Kansas and Texas Railway Company may be separated and broken up and the earning capacity of said lines destroyed or greatly impaired by the contests of creditors having conflicting claims.

And your orator further shows unto your honors that no proceedings at law have been had, nor any suit or action commenced, by or on behalf of your orator, or any holder of any of the bonds of the said company, secured by the mortgage aforesaid, for any interest unpaid or accrued thereon, except only this action.

In consideration whereof, and for as much as your orator is remediless in the premises, at and by the strict rules of the common law, and are only relievable in a court of equity, where matters of this kind are properly recognizable and relievable.

Your orator therefore prays the aid of this honorable court, and that the said mortgage or deed of trust may be decreed to be a lien upon all the property, real, personal or mixed, rights, franchises, lands, land grants, titles, railroads, branches and extensions of the said Missouri, Kansas and Texas Railway Company, described in the said mortgage or deed of trust, within the jurisdiction of this honorable court, and that the said Missouri, Kansas and Texas Railway Company may be decreed to pay unto your orator and the other bondholders under aforesaid mortgage or deed of trust all arrears of interest now due, or that may hereafter become due and payable upon said bonds, together with all the costs and expenses in this behalf incurred and expended. And, in default thereof, that the said defendants above named, and all persons claiming under them or either of them, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the said mortgaged premises, and every part and parcel

thereof, and that all and singular the said mortgaged premises, within the jurisdiction of this honorable court, with the appurtenances, property and effects, rights, immunities and franchises in the said mortgage mentioned, may be sold under a decree of this honorable court, and that out of the money arising from the sale thereof, after deducting from the proceeds of any such sale just allowance for all disbursements and expenses of the said sale, including attorneys' and counsel fees, and the reasonable charges of your orator for services rendered as trustee and for all expenses incurred by it in the premises, and all payments which may be made for taxes or assessments on the said premises, or any part thereof, to apply the said proceeds to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid, whether or not the same shall previously have become due, and of the interest which shall at that time have accrued on the said principal and be unpaid, without discrimination or preference, ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest.

And your orator further prays that an account may be taken of the bonds secured by the said General Consolidated Mortgage, and of the amount due on said bonds for principal and interest, or either, and the names of the lawful holders thereof may be ascertained.

And your orator further prays that a receiver may be appointed according to the course and practice of this court, with the usual powers of receivers in like cases of all the property, equitable interests, things in action, effects, money, receipts and earnings, rights, privileges, franchises and immunities of the said railway company, and of all other property included in and covered by the said mortgage within the jurisdiction of this honorable court, and that the defendants be decreed to make such transfer or conveyances to such receiver, and to the purchasers of said property at any sale as aforesaid, as may be necessary and proper to put them or either of them in possession and control of said property.

And your orator further prays that a writ of injunction issuing out of and under the seal of this honorable court, or issued by one of your honors, according to the form of the statute in such case made and provided, directing, commanding, enjoining and restraining the said defendants, and each and every one of them, from interfering with, transferring, selling and disposing of any of the property mentioned in and covered by the said mortgage, or from taking possession of, levying upon or attempting to sell, either by judicial process or otherwise, any portion of the property embraced in or covered by the said mortgage; and that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require and to this honorable court shall seem meet.

And it may please your honors to grant unto your orator a writ of injunction, issuing out of and under the seal of this honorable court, or issued by one of your honors, according to the form of the statute in such case made and provided, directing, commanding, enjoining and restraining the said defendants, and each and every one of them, from interfering with, transferring, selling or disposing of any of the property mentioned in or covered by the said mortgage, or from taking possession of, levying upon or attempting to sell, either by judicial process or otherwise, any portion of the prop-

erty embraced in or covered by the said mortgage. And may it please your honors to grant unto your orator a subpoena of the United States of America, issuing out of and under the seal of this honorable court, directed to the Missouri, Kansas and Texas Railway Company, and the Missouri Pacific Railway Company, the defendants respectively, therein and thereby commanding them, on a day certain therein to be named, and under a certain penalty, to be and appear before this honorable court, then and there to answer (but not under oath) all and singular the premises, and to stand to, perform and abide by the said order, direction and decree as may be made against them in the premises as shall seem meet and agreeable to equity and good conscience.

And as to the said Missouri Pacific Railway Company, who is properly a party defendant to this bill of complaint, and who is a citizen of the state of Missouri, and who may be out of the jurisdiction of this court, your orator prays that process may be issued to make it party if it should come within such jurisdiction, or that if it should not come within such jurisdiction, such proceedings may be had in regard to such defendant, by publication or otherwise, to conclude it in this behalf as may be authorized by and be according to the form of the statutes in such case made and provided.

And your orator, as in duty bound, will ever pray, etc.

ALEXANDER & GREEN,

Solicitors for Complainant.

THOMAS H. HUBBARD,

JOHN J. MCCOOK,

WILLIAM W. GREEN,

Of Counsel.

UNITED STATES OF AMERICA, } ss.  
Southern District of New York, }

Edward L. Montgomery, being duly sworn, says: That he is the vice-president of the Mercantile Trust Company, the complainant in the foregoing bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others he believes them to be true.

That in regard to all matters and things in the foregoing bill of complaint alleged which are not within the personal knowledge of this deponent the deponent has been fully informed and he believes that the same are true.

EDWARD L. MONTGOMERY.

Sworn to before me this 5th day of June, 1888.

HENRY P. BUTLER,

[SEAL.]

U. S. Commissioner for the Southern Dist. of N. Y.

*Order Taking Jurisdiction.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

THE MERCANTILE TRUST COMPANY, Trustee,	}	IN EQUITY.
vs.		
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, AND THE MIS- SOURI PACIFIC RAILWAY COMPANY.		

## ORDER.

Now, on this 9th day of June, 1888, comes the complainant, by its counsel, Thos. H. Hubbard and John J. McCook, and, having filed its bill of complaint and exhibits, moves thereon, and upon the affidavits of Edward L. Montgomery, Wm. L. Bull and Edward D. Adams, for the appointment of a receiver of the railway and property of the Missouri, Kansas and Texas Railway Company; and thereupon the defendant, the Missouri, Kansas and Texas Railway Company, appearing by its counsel, L. B. Wheat and T. N. Sedgwick, and asking a postponement of the application, and the defendant, the Missouri Pacific Railway Company, appearing by its counsel, A. G. Cochran and B. P. Waggoner:

It is ordered that the complainant's application be and is sustained, and the further hearing stand over to the 2d day of July, A. D. 1888, at Leavenworth, Kan., 10 A. M., with the right to all parties to be then heard on the merits of said application, without any prejudice by reason of this order, and that in the meantime the defendants be restrained from making any change in the present status of said Missouri, Kansas and Texas Railway other than may be necessary in the proper operation of said railway as heretofore.

DAVID J. BREWER, Circuit Judge.

*Order Concerning Application for Receiver and Extending  
Time to Answer, etc.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

THE MERCANTILE TRUST COMPANY, Complainant,	}
vs.	
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, AND THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.	

## ORDER.

And now, on this 2d day of July, A. D. 1888, in pursuance of the stipulation of the parties hereto, it is now by the court here ordered that the

further hearing of the application for the appointment of a receiver in this case shall stand over until such date as may be fixed in a written notice to be served by the complainants, at least twenty days before the date so fixed, or such shorter time as may be allowed as notice. In event of an application by any other person for the appointment of a receiver of said property, and until the further order of the court, and notwithstanding the filing of the bill of complaint or any order heretofore made, or this order, the Missouri Pacific Railway Company may continue to operate, under the existing lease thereof, the railroad and property of the Missouri, Kansas and Texas Railway Company, and shall have and enjoy all rights and privileges under said lease as fully and completely as if the bill of complaint herein had not been filed, or the order of June 9th or this order been made.

And it is further ordered that until further order of the court the management, operation and control by the International and Great Northern Railroad Company of its railroad and property, and the disposition and control of its revenues by the said International and Great Northern Railroad Company, shall so be and remain the same as if said bill of complaint had not been filed, or any order heretofore or this order been made.

And it is further ordered that the time within which defendants may file answers in this case be and the same is hereby extended for the period of sixty days from the date of this order.

DAVID J. BREWER, Circuit Judge.

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*Notice of Further Hearing of the Application for Receiver.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

THE MERCANTILE TRUST COMPANY,	}	IN EQUITY.
Complainant,		
vs.		
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY <i>et al</i> , De- fendants.		

Notice is hereby given, pursuant to the terms of an order in this cause, dated the 2d day of July, 1888, that the further hearing of the application for the appointment of a receiver herein will be had before the Honorable David J. Brewer, the circuit judge of this circuit, at Leavenworth, Kansas, on Wednesday, the 29th day of August, 1888, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated August 8, 1888.

Yours, etc.,

ALEXANDER & GREEN,  
Solicitors for Complainant  
Office and P. O. Address,  
120 Broadway,  
New York City, N. Y.

To—

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

THE MISSOURI PACIFIC RAILWAY COMPANY.

A. S. THOMAS, ESQ.,

Clerk of the U. S. Circuit Court, Topeka, Kansas.

MESSES. DILLON & SWAYNE,

Solis. for Deft. Mo. Pacific Ry. Co.

SIMON STERNE, ESQ.,

Solis. for Deft. Mo., Kansas & Texas Ry. Co.

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*Order Associating Counsel for the Defendant.*

THE MERCANTILE TRUST COMPANY }  
6181.                    vs. }  
THE MISSOURI, KANSAS AND TEXAS }  
RAILWAY COMPANY *et al.* }

Now comes defendant, the Missouri, Kansas and Texas Railway Company, by Simon Sterne, its counsel, and states to the court, on the hearing herein, that Charles F. Beach, Jr., has been associated by said defendant as one of its counsel in this cause, and moves that the proper entry be made thereon. It is ordered that the clerk of the court make minute of the same, and that said Charles F. Beach, Jr., is so associated of record as of counsel to said defendant in this cause.

October 1, 1888.

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*Order of Appointment of a Railway Receiver.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, IN THE EIGHTH CIRCUIT.

THE MERCANTILE TRUST COMPANY, }  
Trustee, Complainant, }  
  vs. }  
MISSOURI, KANSAS AND TEXAS RAIL- } IN EQUITY.  
WAY COMPANY, AND THE MIS- }  
SOURI PACIFIC RAILWAY COM- }  
PANY, Defendants. }

In this cause an order was duly made on the 9th day of June, 1888, that the complainant's application for a receiver be and is sustained, and that the further hearing of such application stand over until the 2d day of July, 1888, and that the rights of all parties be then heard on the merits of said application, as will more fully appear by reference to said order; and on the 2d day of July, 1888, under stipulations of the parties, the court ordered that the further hearing of the application for the appointment of a receiver in said cause shall stand over until such date as should be fixed by written notice as particularly specified in such order; and pursuant thereto notice



has been duly given, fixing this the 25th day of September, 1888, for such hearing.

Now on this 25th day of September, 1888, comes the Mercantile Trust Company, trustee, complainant, by Alexander & Green, its solicitors, and Thomas H. Hubbard, John J. McCook and Wm. Nelson Cromwell, its counsel; and also come the defendants, the Missouri, Kansas and Texas Railway Company, by Simon Sterne, James O. Broadhead and L. B. Wheat, its counsel; the Missouri Pacific Railway Company, by B. P. Waggoner, its solicitor, and Alexander G. Cochran, of counsel.

And thereupon came on for hearing upon the bill of complaint, answer, exhibits and affidavits the said application of the said Mercantile Trust Company for the appointment of a receiver, which application is not resisted by the Missouri Pacific Railway Company, but is resisted by the Missouri, Kansas and Texas Railway Company; and the same having been argued by counsel and considered by the court, it is now hereby ordered, adjudged and decreed that Geo. A. Eddy and Harrison C. Croes be and they are hereby appointed receivers of the property of the Missouri, Kansas and Texas Railway Company covered by the mortgages made by the said company which are sought to be foreclosed in the bill of the Mercantile Trust Company, complainant, with the following powers and instructions, to wit:

*First.*—Said receivers are hereby directed to take, on the 1st day of November, 1888, possession of all of the said mortgaged property, and to operate and cause to be operated the said railroads mortgaged as aforesaid, as herein provided, and to preserve and protect all of the said mortgaged property, acting in all things under the order of this court, or of such other courts as may entertain jurisdiction of parts of the said mortgaged property as ancillary to the jurisdiction of this court.

*Second.*—The said receivers also, in like manner, shall, until otherwise ordered, pay all rentals accrued, or which may hereafter accrue, upon all leased lines of the Missouri, Kansas and Texas Railway, and for the use of all terminals or track facilities, and all such rentals or instalments as may fall due from the said company for the use of any portion of the road or roads or terminal facilities of any other company or companies, and also all sums of money due or to become due for rolling-stock or for steel, iron, ties, or other materials, for the maintenance of way or construction, sold or contracted to be sold to or for the benefit of the Missouri, Kansas and Texas Railway Company. And it appearing to the court that the Missouri, Kansas and Texas Railway Company has commenced or promoted the construction of a branch railroad from Dallas, in the State of Texas, to or towards Waco, in said State, and has expended a very considerable sum of money thereon, and that the company constructing said road is under a statutory obligation to complete and equip at least ten miles of the same prior to the 26th day of December, 1888; and upon such completion the said Missouri, Kansas and Texas Railway Company will be entitled to certain stocks and bonds, and upon failure so to complete will forfeit all of the corporate franchises and rights belonging to said branch railroad; wherefore, the receivers are authorized, if in their judgment it shall be to the best interests of all parties concerned, to build and equip the said ten miles of said road, and in all respects to comply with the statutory requirements of the State of Texas in relation thereto.

*Third.*— And the said receivers are also authorized to defend any actions pending or which may be brought seeking to establish claims, liens or demands against the said company or its property, and to prosecute or continue any action already brought against any corporation or party for the recovery of any money or property due to the said Missouri, Kansas and Texas Railway Company.

*Fourth.*— Said receivers shall also pay, out of any income or revenues which may come into their hands, all just claims and accounts for labor, supplies, professional services, salaries of officers and employees remaining unpaid, and that have been earned or have matured within three months prior to the said 1st day of November, 1888.

*Fifth.*— The matter of the payment of balances due or to become due to other railroads or transportation companies, growing out of the exchange of traffic, is reserved for further orders.

*Sixth.*— The said receivers are further ordered and directed to pay all taxes on the said mortgaged property as the same shall mature, and also all the current expenses in the operation and maintenance of the said road, and to collect all the revenues thereof.

*Seventh.*— The said receivers are further ordered and directed to keep, or cause to be kept, such accounts as may be necessary to show the sources from which all the income and revenues shall be derived, with reference to the interest of all the parties to each of the mortgages mentioned in the complainant's bill.

*Eighth.*— The receivers shall report to this court from time to time, at least once in three months, their doings under this order, and they may apply to this court for instructions whenever necessary.

*Ninth.*— The said receivers, before entering on their duties, shall each take and subscribe an oath to perform them faithfully, and with one or more sureties, approved by this court or any judge thereof, shall execute an undertaking to the clerk of said court, for the benefit of whom it may concern, in the penal sum of two hundred thousand (\$200,000) dollars, conditioned to the effect that he will faithfully discharge the duties of receiver herein, and obey the court.

*Tenth.*— It is further ordered that all parties having in their possession any of the said mortgaged property shall, upon written demand of said receivers, yield up and deliver said property to them, and the complainant and defendants are and each of them is authorized to apply to any other United States circuit court of competent jurisdiction for such other order or orders in aid of the primary jurisdiction vested in this court, in said cause, as may have ancillary jurisdiction herein.

*Eleventh.*— And it appearing to the court that certain bonds and stocks claimed to be the property of the said defendant, the Missouri, Kansas and Texas Railway Company, are now in the possession of the Mercantile Trust Company, the complainant herein, it is ordered that said Mercantile Trust Company retain the possession of said property until the further order of this court, unless the surrender thereof shall be duly ordered by some court of competent jurisdiction.

To all of which orders and appointments the Missouri, Kansas and Texas Railway Company, defendant, objects and excepts.

DAVID J. BREWER, Circuit Judge.

*Petition for Rehearing of Application for Receiver.*

UNITED STATES OF AMERICA, DISTRICT OF KANSAS, IN THE  
CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT  
OF KANSAS.

IN EQUITY.

THE MERCANTILE TRUST COMPANY,	}	PETITION.
Complainant,		
vs.		
THE MISSOURI, KANSAS AND TEXAS		
RAILWAY COMPANY, AND THE		
MISSOURI PACIFIC RAILWAY		
COMPANY, Defendants.		

*To the above-named Circuit Court, and to the Hon. David J. Brewer, Judge  
of the Circuit Court of the United States for the Eighth Judicial Dis-  
trict:*

And now comes the Missouri, Kansas and Texas Railway Company and petitions said court and judge to grant a new hearing of the application of the above-named complainant for the appointment of a receiver in this above-entitled suit, and to set aside the orders heretofore made in said cause appointing a receiver and granting him power, for the following reasons: Because in and by the mortgage on which the bill in said suit is founded it was and is, among other things, agreed and set forth as follows:

*"Article second.—Until default shall be made in the payments of principal or interest, or some part of either principal or interest, as herein provided, the said party of the first part shall possess, control, manage, operate, use and enjoy the said railways, rolling-stock, equipments, franchises, real estate and other property, and shall receive, take and use the rents, incomes, profits and tolls thereof for its own uses and purposes, as if this indenture had not been made.*

*"But in case default shall be made in the payment of the principal or of any interest on any of the aforesaid bonds, issued under and secured by this instrument according to the tenor thereof, or of the coupons thereto attached, and if such default shall continue for the period of six months after demand in writing made for the payment of the same at the financial agency of the said party of the first part, aforesaid, in the city of New York, it shall be lawful, unless such default be waived as hereinafter provided, for the said trustee, the said party of the second part, or its successor or successors in this trust, by itself, its attorneys or agents, to enter in and upon and take possession of all and singular the railways, premises and property, rights and interests, hereby conveyed and mortgaged, or intended so to be, and each and every part thereof.*

\* \* \* \* \*

*"Article third.—In case default shall be made in the payment of any interest upon any of said bonds, or of the principal thereof, as aforesaid and shall continue for six months after demand made for payment, as aforesaid, it shall be lawful, unless such default be waived as herein provided, for the said trustee, the said party of the second part, or its successor*

or successors in this trust, after entry as aforesaid, or other entry, or without entry, by its attorney or attorneys, agent or agents, to sell and dispose of all and singular the said railways and appurtenances, property and premises, rights, interests and franchises hereby conveyed or mortgaged, or intended so to be, at public auction.

\* \* \* \* \*

"This provision is cumulative to the ordinary remedy by foreclosure in the courts, and the trustee herein, or its successor or successors in this trust, upon default being made as aforesaid, may, at its discretion, and upon the written request of the holders of the majority in value of the said bonds then unpaid, shall (upon being properly indemnified) institute proceedings to foreclose this mortgage or deed of trust, in such manner (by sale under the power herein given, or by suit) as the majority of the said bondholders may direct; and if no such direction is given in this behalf, then in such manner as to the said trustee may seem most expedient.

"For the debt or bonds secured hereby the said railway company, the said party of the first part, is liable in *personam*, and any deficit after exhausting the mortgaged security may be enforced against the said company or its other property, but not against the stockholders individually.

"Article fourth.—In case default shall be made in the payment of any semi-annual instalment of interest on any of the said bonds, at the time and in the manner in said bonds and interest coupons provided, and if such default shall continue for the period of six months after due demand made for payment as aforesaid, then in such case the principal sum of all the said bonds secured hereby shall, in case a majority in interest of the holders of the said bonds, in writing under seal, so elect, become and be immediately due and payable, anything contained in the said bonds to the contrary notwithstanding. And a majority in interest of the holders of said bonds may, by writing, under their hands and seals, executed at a meeting of the said bondholders, or without such meeting, declare or instruct the then trustee in this trust to declare the said principal of the said bonds to be due and immediately payable, or may waive, or may instruct the said trustee to waive, any default in the payment of principal or interest, on such terms and conditions as such majority in interest may deem proper: *Provided always* and it is hereby declared, that no such action of the trustee or bondholders shall extend to or be taken to affect any subsequent default, or to impair the rights resulting therefrom. But subsequent defaults on the payment of principal or interest may, in like manner, be waived, at any time before the entry of a decree of foreclosure, by a majority in interest of the bonds secured hereby.

"Meetings of the holders of the said bonds hereby secured, for the determination of or action upon any of the questions upon which, by any of the provisions hereof, the majority in interest of said bondholders may have the right to decide, may be called by the then trustee, or in such other mode as may be, from time to time, fixed by such majority in interest of the holders of said bonds in respect to such meetings; and until said bondholders shall so act, such powers may be exercised by the said trustee in this trust; and all acts or resolutions of the said bondholders affecting the rights or remedies, or for the benefit, of the said bondholders, or the duties of the

trustee, or the interest of the trust hereby created, shall be authenticated by the signatures of all the persons assenting thereto, as well as by a record of the proceedings to be kept of any such meetings.

But it is understood, and hereby expressly declared and agreed, that no act or resolution of any meeting of bondholders, or of the trustee, nor any act or election of or instrument executed by a majority in interest of all said bonds, shall impair, control or affect the rights, interests or remedies, legal or equitable, of any non-assenting bondholder, except in the particulars and to the extent to which the same is expressly made controlling by the provisions contained herein."

And inasmuch as in last quoted part of article third the default is not limited merely to non-payment of either principal or interest, and says nothing of either, but speaks of default before mentioned, that is, such default as should be *made as aforesaid*, the default there referred to is clearly such a default as should be made in the manner before mentioned, that is, such a default as before spoken of, and the only defaults before spoken of were defaults in the payment of either principal or interest after demand made in writing. Mere default in payment of either principal or interest was not the default *made as aforesaid* at the commencement of that third article. The default there referred to was such a default as before mentioned *made as aforesaid*, that is, a default of the description mentioned in the quoted part of article second; and that default was specified as one continuing for the period of six months after demand in writing made for payment of the same at the financial agency, etc., so that there could be no default referred to in any of above-copied parts of the mortgage, except the default made by non-payment of principal or interest, continuing for six months after demand in writing made at such agency, etc.

And by the above-copied parts of article second, right to retain possession, and to receive, take and use the rents, incomes, profits and tolls for its own use, etc., same as if that mortgage had not been made, was clearly given to your petitioner until default was made, as provided in the above-copied parts of the mortgage; we submit that is so clear that argument or illustration could not make it plainer than appears from the mere reading of said second article, commencing on page 55 of complainant's bill, and if we are right in that, we ask for a reconsideration of our claim to the effect that the words upon default being *made as aforesaid*, in the last above-copied part of the third article, refer to the default mentioned in the second article, which should occasion the loss of the right of your petitioner to retain possession, etc.

If we are wrong in thus claiming, it follows not only that mortgage is inconsistent with itself, but the words "as aforesaid," in the said latter part of article third, must be ignored; and it is a maxim of construction of contracts as well as of statutes that no word is to be ignored without adequate cause; and surely the words "as aforesaid," when they carry us back to the manner and length of time of default, if any force is given to them, should not be ignored and in effect stricken out from the mortgage. The parties did not strike them out, but inserted them, and that "as aforesaid" can only refer to default made after demand in writing at such agency, continuing six months

Such was the contract of the parties, and we submit that the cases of *Brine v. Insurance Co.*, 96 U. S. 684, 686, and *Insurance Co. v. Cushman*, 108 U. S. 51, show that such right of possession, use, etc., reserved by that mortgage to your petitioner until after such six months' continuing default is a property right, just as binding and obligatory as any other contract right; and if that be so, then we submit there is no pretense of the forfeiture of that right, and cannot be any made or shown under the mortgage. Practically such six-months question is in effect the same as the question in the above-cited cases, the question there being in substance and effect one affecting the right of the possession, use and profits of the property, the same as here; also affecting the time within which parties can make payment by prolonging the time when the court proceedings could end.

And we submit no reason can be shown for making a difference between those cases and this as to those matters.

It is respectfully urged upon the attention of the court that any reading of articles two, three and four of the mortgage shows the clear intention to protect the mortgagor in the quiet enjoyment of its property, and to suspend all remedies against it for six months after default. In this particular case, the words "as aforesaid" most clearly have a distinct intention, and are not mere verbiage. Had it been the intention to permit a seizure of the defendant's property under foreclosure in less than six months, these words, "as aforesaid," would have been carefully avoided, and other words would have been used to show that such foreclosure was not to be within the restriction of the six-months clause. Nor is there any reason apparent why this six-months provision should apply to entry and sale and not to suit for foreclosure. The court will not assume that a mortgage was drawn without any restriction upon foreclosure, while entry and sale were delayed for six months, because the parties acted upon the belief that the court would proceed more slowly still. And the event shows that such belief, if entertained, was incorrect, because the court has, in less than the time limited, taken possession of the property.

If there is any doubt of construction in regard to the meaning of the words "as aforesaid," it should be resolved in favor of the defendant and against a forfeiture. In this as in other cases the position of the defendant is the better.

With reference to the claim that the case of *Chicago and Vincennes R. R. Co. v. Fosdick*, 106 U. S. 47, etc., sustains complainant's claim of right to commence suit to foreclose mortgage, *and by means of a receiver to take possession of the property and receive the income, etc., therefrom*, we submit it does not sustain any such right.

After a careful examination of that case, we respectfully suggest that the court, under the pressure for an immediate decision, must have overlooked the bearing of that very involved and lengthy decision. We respectfully urge that upon careful examination of that decision it would be found in our favor and not against us. It fully recognizes the law of the contract to be that all the provisions in question are protective of the rights of the mortgagor; and we especially call the attention of the court to the fact that the question of the six-months delay did not arise in that case, inasmuch as the action in that case was commenced after the six months had elapsed.

The fact that the action in 106 U. S. was commenced after the lapse of six months is further shown by the dissenting opinion of Chief Justice Waite, on page 79, in which he says:

"Confessedly the default in the coupons on \$698,000 of the bonds continued more than six months."

And again:

"The default having happened and having continued more than six months without the consent of the holders of the coupons, by the express terms of the eighth clause the principal of all the bonds secured by the mortgage became immediately due and payable."

Whether or not the common-law right of action exists upon the coupons independent of the right in equity, cannot be considered in this case to justify, in an action in equity, any defiance of our contract stipulation, which, under article two, provides that until default shall be made and continued, as in the mortgage provided, the railway company is authorized to possess, control, manage and operate, use and enjoy the said railway.

The bond provides that, "if default shall be made in the payment of any six months' semi-annual interest on this bond, when the same shall become due and be demanded, and shall remain unpaid for six months after such demand, the principal of this bond shall become and be due and payable in the manner provided in the said deed of trust."

This is equally true of every other case cited by complainant in which the court held there might be foreclosure for interest as well as foreclosure for principal.

We particularly refer to the following citations from that case:—"But, inasmuch as by the terms of the first article the conveyance is declared to be for the purpose of securing the payment of the interest as well as the principal of the bonds, and by the fourth article the mortgagor's right of possession terminates upon a default in the payment of interest as well as principal on any of the bonds, we are of opinion that, independently of the provisions of the other articles, the trustees, or, on their failure to do so, any bondholder, on non-payment of any instalment of interest on any bond, might file a bill for the enforcement of the security by the foreclosure of the mortgage and sale of the mortgaged property." (106 U. S., p. 68.) We submit it is clear that case is not in point to support such claim in favor of complainant in this case; but on the contrary shows that the right of mortgagor's possession in that case terminated upon the default without any suspension of six months. That is made clear and beyond question by that copied part of the opinion, and that it is of itself an end of that case so far as therefrom any claim is sought to be sustained in favor of complainant now having a receiver.

We submit that that case is in point to the extent of showing that the above-copied parts of the complainant's mortgage are valid, binding and obligatory between the parties, and, in connection with the other case hereinabove cited, shows that your petitioner has a property right to retain the possession until the lapse of six months after demand in writing, etc., according to the above-copied parts of said mortgage.

The following language:—"It is therefore our opinion that even had the trustees declared the principal sum of the mortgage debt due and given the

proper notice thereof, nevertheless the foundation for proceeding to foreclose for that cause and of the decree requiring payment of that amount would fail without proof that the bill had been filed for that purpose, upon the written request of the holders of a majority of the bonds then outstanding. It is not disputed that no such proof is to be found in this record."

"Other errors than those already discussed have been assigned upon both appeals, which, as in the further progress of the cause they may not arise again, we have not considered and do not therefore pass upon" (found in said opinion on pages 78 and 79 of 106 U. S.),— shows why the decree of the circuit court was reversed, and we submit shows that error was committed in appointing the receiver in this case.

With reference to anything said about forfeitures, we submit that the rule in equity is that forfeitures are not favored, and that no one can claim forfeiture under the terms of a written instrument unless clearly within its provisions; and if two constructions can be given to the written instrument, one of which will prevent forfeiture, or rather will show that a forfeiture was not intended in such and such a case, then the rule unquestionably is that such construction as will prevent the forfeiture is to be adopted. This is with reference to the claim that the mortgage is to be construed so as to take from the mortgagor the property in defiance of the provisions and agreement in the above-copied parts of articles two, three and four.

Said case in the 106th U. S. is, as we understand it, only in point in this case for either party to the extent and so far as it is thereby decided that it is competent for parties to a mortgage to limit the time and manner of commencing an action to foreclose the mortgage by stipulation therein. On that point, and on that point only, was the case reversed, as shown by the last above-copied part of the opinion. This shows that there is nothing in the Kansas statutes in relation to receivers, or in the general rule of equity on the same subject, that can override or render nugatory the above-copied parts of the mortgage. The last-copied part of said opinion settles that question against complainant, so that in this case if the mortgage considered altogether gave your petitioner the right to retain the possession, use, etc., for six months after default in payment of principal or interest after demand made in writing at such agency, then from the aforesaid opinion of the Supreme Court it follows that your petitioner has a contract right which without cause is taken from it by the appointment of a receiver. And further, we request attention to said article fourth in the mortgage, in connection with the other parts thereof copied, to show that the words "as aforesaid" in the last part of the third article must refer to the six months' default after demand in writing, or the mortgage is very inconsistent with itself in an important matter. While by making those words operative and of any meaning, our claim that the petitioner is entitled still to retain possession is sustained.

We present this petition for a rehearing in the belief that your honor must have overlooked the first above-copied part of the opinion in 106 U. S. to have arrived at the conclusion you expressed in regard to that case.

Hoping that the reading of this petition and the reasons therefor assigned will induce your honor to grant a reconsideration of the case, your petitioners ask your honor to designate a time and place for such rehearing, and



that your honor set aside the aforesaid orders appointing and giving authority to receivers in this said suit.

Dated September 24, 1888.

Respectfully submitted,

SIMON STERNB,

L. B. WHEAT,

Solicitors for defendant, M. K. & T. Ry. Co.

October 8, 1888.—Overruled. D. J. BREWER, Judge.

### *Order Overruling Foregoing Petition.*

JUNE TERM, 1888.

THE MERCANTILE TRUST COMPANY,  
Complainant,  
6181. vs.  
THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY, AND THE  
MISSOURI PACIFIC RAILWAY  
COMPANY, Defendants.

The petition of the Missouri, Kansas and Texas Railway Company to the court to grant a new hearing of the application of complainant for the appointment of a receiver, and to set aside the order heretofore made appointing a receiver in this suit, came on to be heard and was argued by counsel, on consideration whereof the court overrules said petition.

### *Oath of the Receiver.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, IN THE EIGHTH CIRCUIT.

THE MERCANTILE TRUST COMPANY,  
Trustee, Complainant,  
vs.  
THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY, AND THE  
MISSOURI PACIFIC RAILWAY  
COMPANY, Defendants. } IN EQUITY.

I, the undersigned, George A. Eddy, having been appointed receiver of the Missouri, Kansas and Texas Railway Company, do solemnly swear that I will faithfully perform the duties of that office and obey all the orders of said court. So help me God.

GEO. A. EDDY.

Subscribed and sworn to before me this 6th day of October, A. D. 1888.

DAVID J. BREWER, Circuit Judge.

*Bond of Receiver.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, IN THE EIGHTH CIRCUIT.

THE MERCANTILE TRUST COMPANY,	}	IN EQUITY.
TRUSTEE, Complainant,		
vs.		
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, AND MISSOURI PACIFIC RAILWAY COMPANY, Defendants.		

This undertaking, made and entered into the 6th day of October, A. D. 1888, witnesseth: that we, George A. Eddy, as principal, and Paul E. Havens, Edward Carroll, A. Caldwell, as sureties, do promise and undertake, to and with the clerk of said court, for the benefit of whom it may concern, in the penal sum of two hundred thousand dollars, that the said George A. Eddy will faithfully discharge the duties of receiver of the Missouri, Kansas and Texas Railway Company, and obey all orders of the court herein.

Witness our hands and seals this 6th day of October, A. D. 1888.

GEO. A. EDDY. [SEAL.]

PAUL E. HAVENS. [SEAL.]

EDWD. CARROLL. [SEAL.]

A. CALDWELL. [SEAL.]

Approved this 8th day of October, 1888.

DAVID J. BREWER, Circuit Judge.

STATE OF KANSAS, } ss.  
County of Leavenworth. }

I, A. Caldwell, one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of two hundred thousand dollars over and above all my debts and liabilities and legal exemptions.

Before me,  
[SEAL] E. GREGORY, Notary Public.

A. CALDWELL.

*Order Authorizing Receivers to Purchase Material, etc.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

THE MERCANTILE TRUST COMPANY	}
vs.	
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY et al.	

On application of the receivers heretofore appointed in this case it is ordered that they be authorized to purchase the material and contract for the

completion of fifteen miles of road from Dallas to Lancaster, in Texas, and that if necessary they borrow money for the carrying out of this contract on the credit of the property in their possession.

November 10, 1888.

DAVID J. BREWER, Circuit Judge.

*Order Extending the Receivership.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, IN THE EIGHTH CIRCUIT.

THE MERCANTILE TRUST COMPANY,	}
TRUSTEE, Complainant,	
vs.	
MISSOURI, KANSAS AND TEXAS RAIL- WAY COMPANY, AND THE MIS- SOURI PACIFIC RAILWAY COM- PANY, Defendants.	

An order was heretofore made in this suit, bearing date the 25th day of September, A. D. 1888, and entered on the 8th day of October, A. D. 1888, in which and whereby it was ordered, adjudged and decreed that George A. Eddy and H. C. Cross be appointed receivers of the property of the Missouri, Kansas and Texas Railway Company covered by mortgages made by the said company, which are sought to be foreclosed in the bill of complainant herein, with the powers and instructions stated in the said order.

Now, on this 26th day of November, A. D. 1888, there comes before me the Missouri, Kansas and Texas Railway Company, one of the above-named defendants, by E. Ellery Anderson and Simon Sterne, its counsel, and the said The Missouri Pacific Railway Company, the other defendant, by Alexander G. Cochran, its counsel, who appears in opposition to the present application, and claims that the court has no jurisdiction to make the order as prayed for, or any order in the premises; and the said George A. Eddy and H. C. Cross, receivers, by — —, their counsel.

And it also appearing that the Mercantile Trust Company, trustee and complainant, has received due notice of this application, and has signified that it does not oppose the granting of the relief prayed for by the Missouri, Kansas and Texas Railway Company.

And thereupon came on for hearing the said application of the defendant, the Missouri, Kansas and Texas Railway Company, and on its said petition, and on the affidavit of William Bond on the bill of complaint, and all the proceedings in this cause, and it further appearing to my satisfaction that the relief prayed for is necessary for a full and complete protection of the property covered by said the mortgage, and referred to and described in the bill of complaint, and that by reason of the allegations contained in the petition of the defendant, the Missouri, Kansas and Texas Railway Company, it is entitled to the relief therein prayed for:

It is now hereby ordered, adjudged and decreed that the receivership of the said George A. Eddy and H. C. Cross be, and the same is hereby, extended to cover all interest and estate of the Missouri, Kansas and Texas

Railway Company in the property and assets described in said petition to wit: Ninety-seven thousand two hundred and eighty-four shares of the capital stock of the International and Great Northern Railroad Company; one thousand shares of the capital stock of the Galveston, Houston and Henderson Railroad Company; nine thousand nine hundred and sixty-eight shares of the capital stock of the Boonville Bridge Company; one thousand and sixty-five one-thousand-dollar bonds of the General Consolidated Mortgage, and four hundred one-thousand bonds of the Galveston, Houston and Henderson Railway Company of 1882: *Provided*, however, that this order shall not affect or impair any rights, legal or equitable, in respect to said property, of either the parties to this suit, or of any other person whomsoever, existing at the time of the entry of this order, and shall not affect the rights, legal or equitable, of any other person or corporation having in custody any of said property, or any part thereof heretofore existing, under any claim of right as against the Missouri, Kansas and Texas Railway Company or its receivers; and the parties now in possession of said property shall hold the same subject to any legal or equitable rights of the parties hereto, for the use and benefit of said receivers, subject to the further order of this court, or of any court having ancillary jurisdiction herein.

Nothing herein contained shall be construed as an admission by the said The Missouri, Kansas and Texas Railway Company, or the said receivers, of the validity of any of the said liens, or claims, or of the amount claimed to be due thereon.

Nothing herein contained is intended to affect in any manner the franchises of the said corporation, or its right to continue and maintain its organization.

The said receivers are further ordered and directed to keep such accounts as may be necessary to show any property or assets, the title to which may be vested in them under this order, to the end that the just rights of all parties having claims, rights, liens or demands against the said property or assets, or against the said company, may hereafter be adjudicated and determined by this court, or any other court having ancillary jurisdiction thereof, and the said property and assets applied in conformity with such adjudications.

The said receivers, before entering upon their duties, shall take and subscribe an oath to perform them faithfully, and with one or more sureties approved by this court, or any judge thereof, shall execute an undertaking to the clerk of said court for the benefit of whom it may concern in the penal sum of two hundred thousand dollars, conditioned to the effect that they will faithfully discharge the duties of receivers under this order and under the orders of this court.

The complainant and the defendant, the Missouri, Kansas and Texas Railway Company, are and each of them is authorized to apply to any other United States circuit of competent jurisdiction as may have ancillary jurisdiction herein, for such other order or orders in aid of the primary jurisdiction vested in this court as may be necessary.

To the above order the Missouri Pacific Railway Company duly excepts.

DAVID J. BREWER, Circuit Judge.

*Receiver's Petition for Authority to Purchase Rails and Ties.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, IN THE EIGHTH CIRCUIT.

THE MERCANTILE TRUST COMPANY,  
Complainant,

vs.

THE MISSOURI, KANSAS & TEXAS  
RAILWAY COMPANY AND THE  
MISSOURI PACIFIC RAILWAY  
COMPANY.

} IN EQUITY.

The petition of George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway Company, respectfully shows:

*First.*—On the lines of the railway in the possession of your receivers, there are portions of the track, aggregating to many miles, which are laid with iron rails, and which are light in weight, and badly worn out, so that trains cannot be operated with safety and ordinary speed over the same.

Some of the more important points where such iron rail is laid and where the same is peculiarly dangerous and unsafe are the following: Near Waco, Texas, twenty-five (25) miles; between Denton and Dallas, Texas, thirty-eight (38) miles; between Gainesville and Whitesboro, Texas, sixteen (16) miles; between Trinity and Colmesneil, Texas, forty-seven (47) miles; on the Lehigh Branch, in the Indian Territory, twelve (12) miles, and between Parsons and Junction City in the State of Kansas, seventy (70) miles.

*Second.*—The main line of the Missouri, Kansas and Texas Railway extends from Hannibal, Missouri, to Taylor, Texas, a distance of about eight hundred and thirty-three miles. The total mileage of the Missouri, Kansas and Texas Railway and the kind of rails used is given in an itemized form, attached hereto, marked Exhibits "A" and "B." "Exhibit A" shows the mileage and weight of rails south of Denison, and "Exhibit B" that north of Denison.

*Third.*—It would be inexpedient and not at all advisable, in the judgment of your receivers, to buy iron rails to replace those which are worn out or are in a bad condition, as hereinbefore stated, but that the best course to pursue is to replace those worn out and useless rails with the light-weight steel rails, fifty-two pounds and fifty-six pounds, taken from the line between Hannibal and Taylor, and to restore the places between Hannibal and Taylor, from which the fifty-two pound and fifty-six pound rails are taken, with sixty-three pound steel rails.

*Fourth.*—Your receivers have made a careful investigation and believe that the best interests of the railway in their possession requires that instead of buying iron rails they should buy steel rails of sixty-three pound weight; that the sixty-three pound rail is that being generally put in at the present time by all good railroads. Railroads now in operation are putting sixty-three pound rails into their main lines. If permitted to buy sixty-three pound steel rails, your receivers can take the fifty-two pound and fifty-six pound rails from its main line between Hannibal, Missouri, and

Taylor, Texas, and use them in putting the railroad at the points hereinbefore referred to in a safe condition and then put the sixty-three pound rails into the main line.

*Fifth.*— In order to put the lines of railway in charge of your receivers in proper condition it will be necessary to have them purchase about fifteen thousand tons of steel rails of sixty-three pounds weight, and all angle bars, bolts and spikes for properly laying the same, so that the same may be delivered in time to be laid during the next year, and that about two (2,000) thousand tons of said rails should be delivered during the present month, three (3,000) thousand tons during the month of January, 1889, and one (1,000) thousand tons on each succeeding month until wholly delivered.

*Sixth.*— The receivers are advised that the present is a favorable time to purchase steel rails; that it is necessary, in order to have the steel rails when needed, that the contracts therefor should be made in advance.

*Seventh.*— Your receivers further show that in order to place the lines of railway in their charge in proper repair, and to maintain the same, it will be necessary to purchase ties, and that such ties should be contracted for at an early a date as possible.

Wherefore, your petitioners ask an order authorizing them to purchase fifteen thousand tons of sixty-three pound steel rails, and ties in sufficient number to keep and maintain the road in proper repair.

WARNER, DEAN & HAGERMAN,

Solicitors for the Receivers.

We, Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway Company, have heard read the foregoing petition, and the facts therein stated are true, as we verily believe.

GEO. A. EDDY.

H. C. CROSS.

Subscribed and sworn to before me, this 8d day of December, A. D. 1888.

[SEAL.]

P. H. SANGREE, Notary Public.

*Petition by Receiver for Authority to Settle Traffic Balances.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, IN THE EIGHTH CIRCUIT.

THE MERCANTILE COMPANY, Com- plainant,	} IN EQUITY.
vs.	
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, AND THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.	

PETITION BY THE RECEIVERS FOR AUTHORITY TO ADJUST, SETTLE AND PAY TRAFFIC BALANCES BETWEEN THE MISSOURI, KANSAS AND TEXAS AND OTHER RAILROADS.

George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, respectfully show :

I. By the decree made in this case on the 25th day of September, 1888, and filed herein on October 8, 1888, being the decree appointing your petitioners receivers, among others the following order was made :

"*Fifth.*—The matter of the payment of balances due or to become due to other railroads or transportation companies growing out of the exchange of traffic is reserved for further orders."

II. Since your receivers have taken possession of the Missouri, Kansas and Texas Railway there have arisen traffic balances between the Missouri, Kansas and Texas Railway, operated by your receivers, and other railways and transportation companies. These traffic balances consist generally of—

1st. Freight balances, which are the amounts found to be due as between freight delivered to connecting lines by the Missouri, Kansas and Texas Railway, and received from connecting lines by said railway.

2d. Ticket accounts. These result from the sale of coupons tickets by the Missouri, Kansas and Texas over foreign lines, and the sale by foreign lines of such tickets over the Missouri, Kansas and Texas Railway.

3d. Mileage accounts. These accounts comprise the mileage of the cars of other railway companies over the line of the Missouri, Kansas and Texas Railway, and the mileage of its cars over other railways.

These traffic balances are sometimes in favor of one road and sometimes in favor of the other. It is vitally necessary in the transaction of railway business that these traffic balances should be promptly paid by the respective railways at stated times.

III. There are traffic balances which will soon have to be discharged arising out of the operation of the railway in charge of your receivers, which will have to be settled, adjusted, collected or paid within a short time, and your receivers should have full authority to adjust, settle, collect or pay them according to the prevailing usage existing among railway companies, so that there may be no interruption of the relations between the railway in charge of your receivers and others railways of the country.

Wherefore, your petitioners pray that an order be entered granting them authority to adjust, settle, collect and pay all traffic balances arising out of the operation of the Missouri, Kansas and Texas Railway since November 1, 1888, and which may hereafter arise from time to time.

WARNER, DEAN & HAGERMAN,  
Solicitors for the Receivers.

STATE OF KANSAS, }  
County of Leavenworth. } ss.

I, George A. Eddy, on oath, state I am one of the receivers of the Missouri, Kansas and Texas Railway; I have read the foregoing petition, and the facts therein stated are true, as I verily believe. GEORGE A. EDDY.

Subscribed and sworn to before me, this 8th day of December, A. D. 1888.

[SEAL.]

E. GREGORY, Notary Public.

GEO. F. SHARITT, Clerk.

### *Order Authorizing Receiver to Settle Traffic Balances.*

At this day the petition of the receivers for authority to adjust, settle, collect and pay all traffic balances arising in the operation of the Missouri, Kansas and Texas Railway since November 1, 1888, when the receivers took possession of said railway, having been presented to the court, and the court having fully considered the same, and being fully advised in the premises, it is ordered that the receivers be and are hereby authorized to adjust, settle, collect and pay all traffic balances between the railway in their charge and other railroads or transportation companies, arising out of the operation of the Missouri, Kansas and Texas Railway since November the 1st, 1888, and which shall hereafter arise, according to the usual methods prevailing among the railroad and transportation companies of the country.

DAVID J. BREWER, Circuit Judge.

### *Petition for an Order Upon a Defendant to Deliver to the Receivers the Deed Records, Plats and Other Muniments of Title.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, IN THE EIGHTH CIRCUIT.

THE MERCANTILE COMPANY, Com-  
plainant,

vs.

THE MISSOURI, KANSAS AND TEXAS  
RAILWAY, AND THE MISSOURI  
PACIFIC RAILWAY COMPANY.

} IN EQUITY.

The receivers, George A. Eddy and Harrison C. Cross, respectfully show :

*First.*—The title papers to the real property in their possession consist of deeds of conveyances for right of way, depot grounds and other parcels and



tracts of land used by the railway company in the operation and maintenance of said railway, and lands purchased or donated to said railway or its grantors as authorized by its charter.

*Second.*—That said Missouri, Kansas and Texas Railway Company and the other corporations whose property is now in the possession of these receivers, and their grantors, during the time of the construction of said railways, and from time to time as their requirements rendered necessary, condemned by proceedings in court in the different counties along the lines of said railways, tracts of lands for right of way, depot grounds and for other necessary purposes, and for their convenience had prepared and on file in their offices copies of all such condemnation proceedings.

*Third.*—That said Missouri, Kansas and Texas Railway Company, also for the convenience and use of its officers and employees, that they might readily ascertain the exact boundaries of the different tracts and parcels of lands so conveyed to it and its grantors, or the other lines of railway in its possession and operated by it, or condemned as aforesaid, caused full and accurate surveys of the same to be made, and caused plat books and surveys made thereof and caused indexes to be prepared thereof.

*Fourth.*—That said papers, records, plats, etc., show in convenient shape all the property along the lines of said railway now in the possession of these receivers, and the title thereof, and the rights of all of said railways in each piece of said property, and how acquired, and from whom and under what contracts or conditions, if any.

*Fifth.*—That said papers, plats, etc., are of great necessity in the operation of said railway, in that they constitute the muniments of title to all of said property, and show the boundary and extent thereof from actual surveys, and enable your receivers to readily ascertain exactly what real estate is covered by the orders of this court, of what they are entitled to take possession, and of what they are required to defend the possession against adverse claimants or intruders, and of what they may rightfully occupy and use in the operation and maintenance of said railway, and by which they may ascertain any conditions upon which any tract of land is held, and determine how, or in what respect, they may be required to comply with demands on them for performance of such conditions.

*Sixth.*—That these receivers require said muniments of title and surveys in many respects as fully and as necessarily as the Missouri, Kansas and Texas Railway Company did at the time they procured the same.

*Seventh.*—That all of said plats, surveys and books and indexes are in the possession of the defendant, the Missouri Pacific Railway Company, and they have neglected and refused to deliver the same to these receivers, though requested to do so.

Wherefore, these receivers pray for an order upon said Missouri Pacific Railway Company, defendant herein, to deliver to them all of said deeds, papers, plats, surveys and books and indexes.

WARNER, DEAN & HAGERMAN,  
Solicitors for the Receivers.

STATE OF MISSOURI,     }  
County of Jackson.    }

I, George A. Eddy, on my oath state that I am one of the receivers of the Missouri, Kansas and Texas Railway; that I have read the above and fore-

going petition, and that the matters and facts therein stated are true, as I verily believe.

GEORGE A. EDDY.

Subscribed and sworn to before me, this 11th day of March, A. D. 1889.

[SEAL.]

STEWART TAYLOR, Notary Public.

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*Order Requiring Defendant to Turn Over to Receivers Books,  
Plats and Deeds.*

ORDER.

At this day the petition of the receivers for an order directing the defendant, the Missouri Pacific Railway Company, to deliver to them certain deeds, records, plats, surveys and other muniments of title to the real property in their possession under the order of this court having been presented to this court, and the court having duly considered the same, it is ordered that the said Missouri Pacific Railway Company deliver to said receivers all deeds of conveyance, records, plats, surveys and books, and all other papers and muniments of title in their possession or under their control pertaining to or affecting the title or right to the possession of the real estate in the possession of the receivers under the orders of the court, or show cause on Thursday, March 21, at 10 A. M., before me at the United States court room in St. Louis, Missouri.

March 11.

DAVID J. BREWER, Circuit Judge.

The foregoing order made absolute and the receivers and Missouri Pacific Railway Company shall make schedule, and receivers shall receipt for same.

March 21, 1889.

DAVID J. BREWER, Circuit Judge.

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*Answer to Petition.*

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT  
OF KANSAS.

THE MERCANTILE TRUST COMPANY }

vs.

THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY *et al.* }

The answer of the Union Trust Company of New York to the petition of the Missouri, Kansas and Texas Railway Company, as to the receivers in the above-entitled action appointed making certain payments on the securities of the International and Great Northern Railroad Company, respectfully shows to this court:

That this respondent has lately exhibited and filed in this court its certain bill of complaint against the said Missouri, Kansas and Texas Railway Company and the Missouri Pacific Railway Company, and that, as respondent is informed and believes, the defendants have appeared therein, and said suit is now pending in this court.

This respondent says that all and singular the allegations in said bill of complaint as therein made are true, and that respondent refers to the same on the files of this court, and makes the same and the allegations thereof a part of this answer, the same as if fully set out and incorporated herein.

Respondent further says that it is informed and believes, that at some time heretofore, but long after the execution and delivery of the bonds and the mortgages in respondent's said bill of complaint mentioned, as made and delivered to this respondent and its *cestui que trusts*, said petitioner did obtain the stock of the International and Great Northern Railroad Company, by exchanging therefor a large amount of respondent's own stock, issued for that purpose.

Whether such exchange was valid, or within the corporate powers of petitioner, respondent is not informed; but submits that it was invalid and beyond the powers of petitioner.

Respondent denies that said stock of said International and Great Northern Railroad Company was acquired at an enormous or any outlay. It was simply an exchange of stock.

Respondent admits that the revenues of the International and Great Northern Railroad Company are insufficient to meet its accrued and presently accruing obligations, and that it is now in the hands of receivers, appointed by a court of Texas; and that the interest due on the second mortgage is in default, and has not been and will not be paid.

Respondent does not admit that the reason thereof is that alleged in the petition. The reason alleged is mere opinion and speculation; and respondent knows of no reason to suppose that the management in the future will be improved.

Quite likely a suit to foreclose the International and Great Northern second mortgage will be commenced, but respondent denies that it can embarrass petitioner, as petitioner has not the possession or management of its road. Respondent has no knowledge as to whether there is any probability that in the near future the International and Great Northern Railroad Company can or will earn its present fixed charges, whether operated by the receivers or others.

If it ever could do it, it would be vastly more likely to do it if operated by the trustee of the mortgages taking possession thereof, for it would then have the attention and interest of owners. Respondent has no knowledge or information as to the telegrams in the petition referred to; respondent, however, has no doubt but that the receivers would like the receivers of the petitioner's road, or any one else, to pay the debts of the International and Great Northern Railroad Company.

Respondent further shows that the revenues of petitioner's road in the hands of the receiver are insufficient to pay its own current indebtedness, which is in default and rapidly accumulating.

That the part of the road covered by the mortgage to respondent is by far the more valuable. Respondent is informed and believes that by the report of the receivers recently filed, and which respondent makes a part of this answer, more than four-fifths of the income of the road is from the part covered by the mortgages to this respondent.

That by the terms of such mortgages, copies of which are annexed to said

bill of complaint of this respondent, such income belongs to and is the property of this respondent, and this respondent respectfully submits that this court, and any court, has no power to take such property from respondent without its consent.

Wherefore, respondent asks that the prayer of said petition be denied.

[SEAL.]

UNION TRUST COMPANY OF NEW YORK,

By EDWARD KING, Prest.

ROSSINGTON, SMITH & DALLAS,

Respondents' Solicitors, Topeka, Kansas.

STATE, COUNTY, CITY AND  
SOUTHERN DISTRICT OF NEW YORK }

Edward King, being duly sworn, says that he is president of Union Trust Company of New York, the respondent named in the foregoing answer; that said answer is true to the knowledge of this deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. EDWARD KING.

Sworn to before me, this 16th day of March, 1889.

[SEAL.] J. V. B. THAYER,

Notary Public, Kings County.

Certificate filed in New York county.

### *Order Authorising Receiver to Pay Fees, etc*

THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

THE MERCANTILE TRUST COMPANY  
vs.  
THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY *et al* }

The petition of E. Ellery Anderson, of the city of New York, for the payment by the receivers herein of the sum of twenty-five hundred dollars for moneys advanced by him to pay the fees of Samuel A. Blatchford, Esq., the master in the suit of Horace M. Barry against the Missouri, Kansas and Texas Railway Company, in the circuit court of the United States for the southern district of New York, as is more fully set out in the said petition, coming on to be heard, and the court being fully advised, now, on motion of Charles F. Beach, Jr., Esq., of counsel for the said E. Ellery Anderson, it is—

Ordered, that the receivers herein be and they are hereby directed to pay unto the said E. Ellery Anderson the said sum of twenty-five hundred dollars in full of his advances for master's fees, as in the said petition is fully set forth.

DAVID J. BREWER, Circuit Judge.

March 28, 1889.

*Petition for Direction to Receivers.*

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF KANSAS.

UNION TRUST COMPANY OF NEW YORK	}
vs.	
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY <i>et al.</i>	}

THE MERCANTILE TRUST COMPANY	}
vs.	
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY <i>et al.</i>	}

STATE, CITY, COUNTY, AND SOUTHERN DISTRICT OF NEW YORK,	}	ss.

*To the Honorable the Judges of the Circuit Court of the United States for the District of Kansas:*

The petition of the Union Trust Company of New York respectfully shows to this court: —

Petitioner has lately exhibited in this court its bill of complaint against the Missouri, Kansas and Texas Railway Company *et al.* to foreclose certain mortgages therein described, and that all and singular the allegations in said bill of complaint are true in manner and form as therein made.

Petitioner shows that heretofore the Mercantile Trust Company, complainant in the second above-entitled suit, exhibited its bill of complaint against said Missouri, Kansas and Texas Railway Company *et al.* to foreclose a certain mortgage therein described. The copies of said respective mortgages are annexed to said respective bills of complaint.

In the suit of said Mercantile Trust Company in September, 1888, this court, on the application of complainant, appointed Messrs. Cross and Eddy receivers of the mortgaged property, and in the suit wherein petitioner is complainant, this court, in March, 1889, appointed the same persons receivers of the property described in said mortgages to petitioner.

Petitioner refers to the said bills of complaint, and to the exhibits thereto annexed, and to the said orders, and makes the same parts of this petition the same as if incorporated herein.

Petitioner further shows that the said mortgages to your petitioner are a lien on the said property therein described prior to the lien of the mortgages to said Mercantile Trust Company, and that the mortgages to said Mercantile Trust Company constitute a lien on the property described in the mortgages to your petitioner junior and subject to the lien, thereon of said mortgages to your petitioner. That the mortgages to said Mercantile Trust Company are also a lien on property therein described, and which is not described in the mortgages to your petitioner, and on which the mortgages to petitioner are not a lien.

By each of the orders entered, respectively, one in each of above-entitled suits, said receivers were directed to keep accounts of the earnings of the

separate properties described in said respective mortgages, to the end that the rights and interests of the several parties therein might be ascertained.

Petitioner further shows that it is informed and believes that the part of said property covered by said mortgages to petitioner is valuable and productive of net income over operating expenses, and that the part of said property covered only by the mortgages to said Mercantile Trust Company is of very much less value and is productive of very little net income over and above the operating expenses, and is in bad repair and needs the expenditure of large sums for repairs and replacements.

That since the possession of said receivers they have filed in this court their accounts for the first two months of their operation of said property, to wit, for November and December, 1888.

Said receivers in said accounts have divided the said property into seven divisions, and state the earnings and expenses of each.

The property in the first four of said divisions, to wit, Missouri, Kansas and Texas, North Division, Hannibal and Central Missouri, Tebo and Neosho, Union Pacific, Southern Branch, is all covered by the mortgages to petitioner.

By the report of said receivers the earnings for said two months of the property, subject to petitioner's mortgage, amounted to \$879,158.76, and the expenses charged to the same amounted to \$424,409.99, the difference, \$384,748.77, being net earnings. To that sum the said report shows that \$8,666.66, rental of Osage division, should be added, making net earnings of \$261,410.43.

Deducting from that sum the taxes for the Missouri and Kansas portions of the property, to wit, \$68,286.64, leaves \$193,123.79 as the net earnings of the part of the property covered by petitioner's mortgages.

The said report shows that the earnings of the property not covered by petitioner's mortgages for said two months were \$452,820.84, and the expenses charged to the same amounted to \$870,164.74, and the difference, \$32,655.60, constitute the net earnings.

Said report, however, shows that the taxes on the Texas property were \$50,128.88, which, when deducted, leave the net earnings of the property not covered by petitioner's mortgage \$32,527.27, as against net earnings of property covered by petitioner's mortgage, \$193,123.79.

These two items of \$193,123.79, for the property covered by petitioner's mortgages, and \$32,527.27, for the property not covered by petitioner's mortgages, make the total of net income of \$225,651.06, as stated in said receivers' accounts to December 31, 1888.

The net income of the property not covered by petitioner's mortgage is therefore but little more than one-seventh, and that of the property covered by petitioner's mortgage little less than six-sevenths, of the total income of the whole property, the one-seventh of said net income being \$32,385.864.

Petitioner is informed and believes that the receivers have spent and are spending a large amount of the net income from the property covered by the mortgages to petitioner on the property not covered by said mortgages, to the injury of the petitioner and petitioner's *cestui que trust*, holders of bonds secured by said mortgages to petitioner.

Petitioner is advised that all and singular the net income of the property covered by petitioner's mortgages should be applied, first, to such repairs and replacements as may be necessary to preserve and protect the property covered thereby pending the said suit of petitioner, and thereafter to the payment of the interest on the bonds secured by said mortgages to your petitioner, and that so long as any interest is due and unpaid on said bonds secured by said mortgages to your petitioner, none of said net income should be spent for the care or improvement of property not covered by said mortgages to your petitioner.

Petitioner has within the last day or two, in New York city, been informed by Mr. Cross, one of said receivers, that said receivers are spending the income of said property in the repair and replacement of the whole property wherever it may be needed, without regard to where it has been earned; and petitioner is informed and believes that much more than the share of said net income belonging thereto and earned thereby is being spent on the property on which petitioner's mortgage is no lien.

Petitioner is further informed and believes that the net income of the said respective portions of property since the date of said report to the present time is in about the same proportion as is stated in said report for the time covered by said report, to wit, that the property not covered by petitioner's mortgage earns but about one-seventh part thereof.

Petitioner is further informed and believes that the accounts of said receivers are or should be balanced monthly, and petitioner alleges that the receipts of copies of monthly balances would greatly facilitate petitioner in discharging its duties to its *cestui que trust*, the holders of bonds secured by said mortgages.

Wherefore petitioner prays that the said receivers may be directed to spend no part of the income derived from or earned by the property covered by the petitioner's mortgages upon property not covered by petitioner's mortgages, and that all the income derived from the property covered by petitioner's mortgages over and above the operating expenses thereof be held and reserved pending the suit for the benefit of said property and the payment of the interest on the bonds secured by said mortgages, and that if said receivers do not already do so, they be directed to have their accounts balanced at least monthly, and that copies of such balances, or of statements of accounts made at least monthly, should monthly be furnished to petitioner, and that petitioner may have such other or further relief as may be just.

UNION TRUST COMPANY OF NEW YORK,

By EDW. KING, President.

ROSSINGTON, SMITH & DALLAS,

Solicitors for Petitioner, Topeka, Kan.

WHEELER H. PECKHAM.

Of Counsel, New York City.

STATE, CITY, COUNTY AND  
SOUTHERN DISTRICT OF NEW YORK, } ss.

Edward King, of said city, being duly sworn, says that he is president of the Union Trust Company of New York, and knows the contents of fore-

going petition, and that the same is true to the best of deponent's knowledge, information and belief.

EDWD. KING.

Subscribed and sworn to before me, March 29, 1889.

[SEAL.] J. V. B. THAYER,

Notary Public, Kings County.

Certificate filed in New York county.

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*Order in re Petition for Direction to Receivers.*

APRIL 8, 1889.

THE UNION TRUST COMPANY OF NEW  
YORK  
6280.                    vs.  
THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY *et al.*, De-  
fendants. }

THE MERCANTILE TRUST COMPANY,  
Complainant,  
6181.                    vs.  
THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY *et al.*, De-  
fendants. }

ORDER.

And now comes the Union Trust Company of New York, by its solicitors, and it appearing to the court that said the Union Trust Company has filed its petition in the above-entitled suits for direction to the receivers therein as to the application of the income of said road, and praying that said receivers may be directed to spend no part of the income derived or earned by the property covered by the mortgage given to the Union Trust Company upon property not covered by said mortgage given to said The Union Trust Company, and that incomes derived from the property covered by said mortgage given to the Union Trust Company, over and above the operating expenses thereof, be held and reserved pending said suits for the benefit of said property and payment of the interest due upon the bonds secured by said mortgage to the Union Trust Company, and for other purposes as in said petition set forth. And the same having been presented to the court, it is ordered that the same be set down for hearing before me, at chambers, in the city of Leavenworth, on the 18th day of April, 1889, at 10 o'clock A. M., or as soon thereafter as counsel be notified of the time and place of the hearing thereof.

DAVID J. BREWER,

April 8, 1889.

Circuit Judge.



*Report of Special Master on Receivers' Accounts.*

IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF  
KANSAS.

THE MERCANTILE TRUST COMPANY,	}
Complainant,	
vs.	
THE MISSOURI, KANSAS AND TEXAS	}
RAILWAY COMPANY <i>et al.</i> , De-	
fendants.	

The undersigned, special master in chancery, to whom was referred the report of the receivers in the above-entitled cause, having the books, vouchers and audited accounts of said receivers and such other evidence relating thereto as could be obtained, reports that said report of the receivers, George A. Eddy and H. C. Cross, the same being a report of the assets and liabilities of said receivers, and in their hands and due by them on the 31st day of December, 1888, and of the earnings of the Missouri, Kansas and Texas Railway, from its operation and that of its different divisions, from November 1st to December 31st, 1888, is correct, and fully verified by the evidence produced to me and carefully examined.

Respectfully submitted,

JOHN T. MORTON,  
Special Master in Chancery.

*Order Discharging Railway Receivers.*

AT A STATED TERM OF THE CIRCUIT COURT OF THE UNITED STATES, HELD IN AND FOR THE DISTRICT OF KANSAS, IN THE EIGHTH CIRCUIT, AT THE FEDERAL COURT ROOMS IN THE CITY OF LEAVENWORTH, UPON THE 8TH DAY OF JUNE, 1891.

Present—The Hon. DAVID J. BREWER, Circuit Justice.

THE MERCANTILE TRUST COMPANY,	}	IN EQUITY.
Complainant,		
vs.		
THE MISSOURI, KANSAS AND TEXAS	}	
RAILWAY COMPANY <i>et al.</i> , De-		
fendants.		

A decree having been entered in this suit upon the 23d day of April, 1890, wherein and whereby it was, among other things, ordered, adjudged and decreed that the Missouri, Kansas and Texas Railway Company should, on or before the expiration of thirty days from the date of the said decree, pay into this court or into the hands of a depository to be named by this court, to the credit of this suit, for the use and benefit of the holders of the bonds and unpaid coupons secured by the mortgage of December 1, 1880, and the several mortgages and the certain indenture supplemental thereto, the sum of thirty million three hundred and ninety-three thousand nine hundred

and eighty dollars (\$80,893,980), together with the amount of interest accrued or to accrue on the said bonds from the 1st day of December, 1889, to the time of such payment, and also a sum of money sufficient, in addition, to defray the costs of this action.

On reading and filing a satisfaction piece, dated the 14th day of October, 1890, duly executed, acknowledged and delivered by the Mercantile Trust Company, of the three certain indentures of mortgage dated respectively December 1, 1880, December 1, 1886, and December 1, 1887, and a certain other satisfaction piece dated the 14th day of October, 1890, duly executed, acknowledged and delivered by the Mercantile Trust Company, of a certain indenture dated March 1, 1882, being the same mortgages and the indenture referred to and described in the bill of complaint herein, by which satisfaction pieces the Mercantile Trust Company certifies that the three mortgages and the certain indenture as aforesaid, and the bonds secured by the same, are paid and satisfied, and consents that the said mortgages and the said indenture be discharged of record.

And on reading and filing a stipulation dated May 5, 1891, and signed by the counsel for all parties to this suit, by which it appears that all of the bonds secured by the said mortgages and by the said indenture, and of all the interest due thereon, have been paid by the Missouri, Kansas and Texas Railway Company to the Mercantile Trust Company, trustee; and by which it further appears that the Missouri, Kansas and Texas Railway Company has also paid and discharged all the other sums of money which by the said decree it was required to pay; and by which stipulation it is also consented that a proper order, satisfying and discharging the said decree of April 22, 1890, may be entered in this suit.

And on reading and filing the petition of the Missouri, Kansas and Texas Railway Company, verified the 7th day of May, 1891, praying that the receivers of the railway and property of the petitioner be upon the 1st day of July, 1891, discharged, and the said railway and property restored to the petitioner.

And on reading and filing the report of the receivers, Messrs. George A. Eddy and Harrison C. Cross, verified on the 5th day of June, 1891, showing, among other things, the total amount of their receipts and disbursements substantially, to the date of the hearing upon the motion for the entry of this decree, containing also a statement of suits now pending against them as receivers, or against the Missouri, Kansas and Texas Railway Company and any of its ancillary companies, and of all claims filed against or presented to said receivers or said railway company, so far as they have come to the knowledge of the said receivers, and a general statement of the outstanding liabilities of the said receivers, growing out of the possession, operation and management of the property of the Missouri, Kansas and Texas Railway Company by the said receivers.

And Messrs. George A. Eddy and Harrison C. Cross, receivers of all of the said property, appearing by James Hagerman, Esq., their solicitor, and the matters and things hereinbefore suggested being submitted to the court, and the court being advised:

Now, on motion of Simon Sterne, Esq., of counsel for the petitioner, the Missouri, Kansas and Texas Railway Company,

It is hereby ordered, adjudged and decreed as follows:

*First.*—That the said decree of April 23, 1890, is, in all respects, satisfied and discharged, in so far as the same requires the payment by the Missouri, Kansas and Texas Railway Company of any sums of money. This cause, however, being retained as and for the purposes hereinafter provided.

*Second.*—That the Missouri, Kansas and Texas Railway Company has duly and fully paid to the Mercantile Trust Company, trustee, all the sums of money which, by the said decree, were directed to be paid; the said payments amounting to the sum of thirty million three hundred and ninety-three thousand nine hundred and eighty dollars (\$30,893,980), together with the amount of interest accrued upon the said sum from the 1st day of December, 1889, to the date of the payment thereof; and the said railway company has also duly and fully paid to the said Mercantile Trust Company, trustee, and to its counsel in full, all its and their reasonable commissions, charges, fees and disbursements in the execution of the trust, and in the prosecution of the litigation herein, which said several sums and amounts have, by it and them, been accepted in full for its and their services rendered herein, and the said railway company has also duly and fully paid all costs and allowances which, by the said decree, were directed to be paid.

*Third.*—That on the 1st day of July, 1891, at the hour of noon of that day, Messrs. George A. Eddy and Harrison C. Cross, as receivers, are hereby ordered and directed to deliver to the Missouri, Kansas and Texas Railway Company all the railroads and other property of the said Missouri, Kansas and Texas Railway Company, the Dallas and Wichita Railway Company, the Dallas and Waco Railway Company, the Dallas and Greenville Railroad Company, the Gainesville, Henrietta and Western Railroad Company, the Taylor, Bastrop and Houston Railway Company, the Trinity and Sabine Railroad Company, the Sherman, Denison and Dallas Railway Company, and the Kansas City and Pacific Railroad Company, wherever situated, whereof they took possession as receivers, under and pursuant to the orders of this court, and under and pursuant to the orders in causes ancillary hereto, and which shall then remain in their possession or under their control, together with all the assets of every name and nature, funds, books and accounts, papers and vouchers in their possession or under their control as receivers; and the said receivers shall, contemporaneously with the delivery of the said railroads and property, assign and transfer to the Missouri, Kansas and Texas Railway Company all the assets, uncollected accounts and choses in action of the said Missouri, Kansas and Texas Railway Company, or of either of the other before-mentioned railway companies remaining in their hands, and which have accrued to them as such receivers from the possession and operation of said lines of railway or of any of them; and the said Missouri, Kansas and Texas Railway Company, on the day and at the hour aforesaid, to wit, upon the 1st day of July, 1891, at the hour of noon of that day, shall receive and take possession of all the railroads and other properties, real, personal and mixed, and of all the funds and assets, books and accounts, papers and vouchers, claims, demands and choses in action in the hands of George A. Eddy and Harrison C. Cross aforesaid, receivers of the Missouri, Kansas and Texas Railway, heretofore appointed and now

acting under orders made in this cause and in the ancillary causes between the same parties, pending in the circuit courts of the United States for the eastern and western districts of Missouri, the western district of Arkansas, and the northern, western and eastern districts of Texas; and upon such transfer, assignment and delivery of the property aforesaid by the receivers to the railway company, the property of the said Missouri, Kansas and Texas Railway Company and of the other companies heretofore mentioned shall become liable for all claims and demands accrued, accruing or to accrue against said receivers, arising out of their possession and operation of the said railroads and property which are and have been in their hands or under their control as receivers, including all claims or demands against them arising out of their operation of the East Line and Red River Railroad, which has heretofore been surrendered under orders made in this cause and in the ancillary cause pending in the United States circuit court for the northern district of Texas at Waco, and also all claims and demands existing against said receivers under their receivership by order of appointment made in the cause pending in the United States circuit court for the northern district of Texas at Dallas, wherein the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia is complainant, and the Missouri, Kansas and Texas Railway Company, the East Line and Red River Railroad Company and others are defendants; and also all the current liabilities of said receivers, and all contracts for which the said receivers are or may be responsible.

*Fourth.*— That the said Missouri, Kansas and Texas Railway Company and those claiming under them shall take and receive, on said July 1, 1891, the railroads and properties so transferred, assigned and delivered as hereinbefore ordered, subject to all claims, demands and liabilities now existing, or which hereafter may be made against said receivers, arising out of their receivership, and this court reserves and retains jurisdiction over the said railroads and properties, and the said parties hereto and those claiming under them, for the purpose of determining in this cause, or having determined in any of the circuit courts of the United States in any of the ancillary causes having ancillary jurisdiction herein, all such claims, liabilities and demands, and for the purpose of fully protecting the receivers against any liability on any claims or demands existing or to exist against them, and for the purpose of protecting those having claims against said receivers.

*Fifth.*— That this cause is retained and kept open for the purpose of ascertaining and determining all claims, demands and liabilities against said receivers and against the property in their possession, and to be surrendered by them, which have arisen or may arise out of their said receivership. All such claims, demands and liabilities, if not paid by the Missouri, Kansas and Texas Railway Company in due course, shall be made and presented by intervention in this cause, or in the causes ancillary hereto, for the purpose of being ascertained and determined in and by such proper intervention proceedings; and any orders, judgments or decrees so rendered in such proceedings may be enforced, and shall only be enforced, against the property of the said railway company, to the same extent that judgments could have been enforced if said property had not been surrendered into the possession of said

company but was still in the possession of said receivers. Such intervention proceedings must be filed in this cause in this court, or in any of the circuit courts of the United States having jurisdiction in any of the ancillary causes, on or before the 1st day of January, 1892, and after that date no further interventions shall be permitted in this cause, and the rights of any claimants who shall not, on or before that date, have commenced intervention proceedings to avail themselves of the remedies herein provided for their benefit, shall cease and determine. The receivers shall advertise in daily newspapers published respectively in Kansas City, St. Louis and Sedalia, Missouri, in Parsons, Kansas, and in Dallas, Texas, the date of the intended delivery of the said property to the said company, and shall in said advertisement notify all claimants to present their said claims to the Missouri, Kansas and Texas Railway Company, and if the same are not settled or adjusted that then the said claimants shall intervene in the manner aforesaid and within the time aforesaid, to wit, on or before the 1st day of January, 1892. The said advertisement shall be commenced within five days after the entry of this order, and shall be inserted once a week for three successive weeks.

*Sixth.*— That nothing in this decree contained is intended to affect, or shall be construed as affecting, the status of any pending or undetermined litigation in which said receivers appear as parties. Such litigations may continue to determination in the name of the receivers, but for the use of the Missouri, Kansas and Texas Railway Company, and at its cost and expense, and with the right to that company, should it be so advised, to appear and be substituted in any such litigation.

*Seventh.*— That on the 1st day of July, 1891, on the day fixed for the delivery of the said properties by the receivers to the said railway company, the title or right of possession of George A. Eddy and Harrison C. Cross, receivers, as fixed and determined by the certain order made in this cause, dated September 25, 1888, and filed October 8, 1888, and the said title or right of possession, as fixed and determined by certain subsequent orders made in this cause, extending and continuing the said receivership to the railroads and properties hereinbefore mentioned, shall cease and terminate.

*Eighth.*— That the receivers' quarterly accounts and the reports of John T. Morton, Esq., and Aaron P. Jetmore, Esq., masters, as the same have from time to time been made to this court, which receivers' and master's reports were respectively filed as follows:

Receivers' report for November and December, 1888, filed March 4, 1889.

Master's report thereon filed May 28, 1889.

Receivers' report for January, February and March, 1889, filed July 22, 1889.

Master's report thereon filed August 29, 1889.

Receivers' report for April, May and June, July, August and September, 1889, filed January 14, 1890.

Master's report thereon filed February 22, 1890.

Receivers' report for October, November and December, 1889, filed March 4, 1890.

Master's report thereon filed April 22, 1890.

Receivers' report for January, February and March, 1890, filed June 20, 1890.

Master's report thereon filed July 24, 1890.

Receivers' report for April, May and June, 1890, filed October 24, 1890.

Master's report thereon filed November 29, 1890.

Receivers' report for July, August and September, 1890, filed January 7, 1891.

Master's report thereon filed February 5, 1891.

Receivers' report for October, November and December, 1890, filed May 1, 1891.

Master's report thereon filed May 6, 1891.

Receivers' report for January, February and March, 1891, filed —.

Master's report thereon filed —.

are hereby, and each of the said receiver's and master's reports respectively, is in all things confirmed and approved, the parties having expressly waived the right under the rules to file objections thereto.

*Ninth.*—That the receivers shall file an additional report containing statement of the receipts and disbursements from the 1st day of April, 1891, to the time of the delivery of the property aforesaid, to wit, July 1, 1891, and simultaneously with its submission to the master mail a duplicate of such report to the defendant, the Missouri, Kansas and Texas Railway Company, to its New York office, and thereupon, without further order, said report shall stand referred to the master heretofore appointed in this cause, and he shall forthwith proceed to pass upon the same and report to this court. Within five days after such report of the master has been filed, objections, if any thereto, shall be filed; and if no objections are filed thereto, the same may be submitted to the court without further notice; and if and when approved, the said receivers shall be finally discharged as to an accounting with the Missouri, Kansas and Texas Railway Company and the other companies hereinbefore mentioned, and their bonds canceled and discharged.

*Tenth.*—That the Missouri, Kansas and Texas Railway Company and the said receivers, George A. Eddy and Harrison C. Cross, may apply at the foot of this decree for such other and further relief as may be just.

DAVID J. BREWER, Circuit Judge.

We hereby consent to the entry of the foregoing decree.

THE MERCANTILE TRUST COMPANY,

By ALEXANDER & GREEN, Solicitors.

MISSOURI PACIFIC RAILWAY COMPANY,

By DILLON & SWAYNE, Solicitors.

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*Assignment by Railway Receivers of Choses in Action, etc., on the Surrender of the Property.*

*Know all Men by These Presents:*

Whereas, we, Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, duly appointed and acting as such under certain orders and decrees made in a certain suit in equity pending in the United

States circuit court for the district of Kansas, wherein the Mercantile Trust Company is complainant and the Missouri, Kansas and Texas Railway Company and others are defendants, and also under certain orders and decrees made in certain ancillary causes between the same parties pending in the United States circuit court for the eastern and western districts of Missouri, the western district of Arkansas, and the northern, eastern and western districts of Texas, have been ordered and directed by the certain order entered in said main cause in the United States circuit court for the district of Kansas on the 8th day of June, 1891, to deliver, at the hour of noon on the 1st day of July, 1891, to the Missouri, Kansas and Texas Railway Company, all the railroads and other property of the Missouri, Kansas and Texas Railway Company, the Dallas and Wichita Railway Company, the Dallas and Waco Railway Company, the Dallas and Greenville Railroad Company, the Gainesville, Henrietta and Western Railroad Company, the Taylor, Bastrop and Houston Railway Company, the Trinity and Sabine Railroad Company, the Sherman, Denison and Dallas Railway Company and the Kansas City and Pacific Railroad Company, wheresoever situated, whereof they are in possession as receivers under and pursuant to the orders of the courts hereinbefore referred to; and

Whereas, by said order of June 8, 1891, said receivers were directed, simultaneously with the delivery of the aforesaid railroads and property, to assign and transfer to the Missouri, Kansas and Texas Railway Company all of the assets, uncollected accounts and choses in action of the said Missouri, Kansas and Texas Railway Company, or of either of the before-mentioned railroad companies, remaining in their hands and which have accrued to them as such receivers from the possession and operation of said lines of railway or either of them; and

Whereas, orders have been entered in each of said ancillary suits between the same parties in the above-named circuit courts of the United States for the States of Missouri, Arkansas and Texas, expressly approving and confirming said order of said United States circuit court for the district of Kansas of date June 8, 1891:

Now, therefore, in consideration of the premises, and pursuant to the orders and directions of the courts made as hereinabove stated, we, the said Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway (duly appointed and acting as such by virtue of the orders and decrees in the aforesaid suits in the above-mentioned courts), do hereby assign, transfer and set over to the Missouri, Kansas and Texas Railway Company all and singular the assets, uncollected accounts and choses in action of the said Missouri, Kansas and Texas Railway Company, the Dallas and Wichita Railway Company, the Dallas and Waco Railway Company, the Dallas and Greenville Railroad Company, the Gainesville, Henrietta and Western Railroad Company, the Taylor, Bastrop and Houston Railway Company, the Trinity and Sabine Railroad Company, the Sherman, Denison and Dallas Railway Company and the Kansas City and Pacific Railroad Company, remaining in our hands at the date of the delivery of said railways and properties by us to the said Missouri, Kansas and Texas Railway Company as aforesaid, and which have accrued to us as receivers from the operation and possession of said lines of railway or either of them.

This assignment to become effective at the hour of noon on the 1st day of July, 1891, simultaneously with the delivery of the possession of the railroads and properties of the foregoing companies to the Missouri, Kansas and Texas Railway Company as required by the orders and decrees of the courts hereinabove referred to.

In witness whereof we have hereunto signed our names and affixed our seals this the 22d day of June, 1891.

GEO. A. EDDY. [SEAL.]

H. C. CROSS. [SEAL.]

UNITED STATES OF AMERICA, }  
STATE OF KANSAS, } ss.  
County of Leavenworth. }

Be it remembered that on this 22d day of June, A. D. 1891, before me, E. Gregory, a notary public, duly commissioned, qualified and acting in and for the county and State aforesaid, came Geo. A. Eddy, one of the receivers of the Missouri, Kansas and Texas Railway, and who is personally known to me to be the identical person described in and who executed and signed the foregoing instrument of writing, and duly acknowledged that he executed the same as his free act and deed for the purposes and consideration therein expressed.

[SEAL.] In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

E. GREGORY, Notary Public.

### *Ancillary Bill for Foreclosure of Railway Mortgage.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, IN THE FIFTH CIRCUIT, AT  
WACO, TEXAS.

THE MERCANTILE TRUST COMPANY, }  
Complainant, }  
vs. } IN EQUITY.  
THE MISSOURI, KANSAS AND TEXAS }  
RAILWAY COMPANY *et al.*, De- }  
fendants. }

#### ANCILLARY BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, IN THE FIFTH CIRCUIT.

*To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Texas sitting in Equity:*

Humbly complaining, shows unto your honors, your orator, the Mercantile Trust Company, a corporation created by and existing under the laws of the State of New York, and a citizen and resident of said State, that it



has already filed in the circuit court of the United States for the district of Kansas, the court having jurisdiction of the Missouri, Kansas and Texas Railway Company, a bill of complaint against said Missouri, Kansas and Texas Railway Company, a corporation having its principal office in the State of Kansas, and a citizen and resident of said State of Kansas, and against the Missouri Pacific Railway Company, a corporation existing under the laws of the State of Missouri, and of said State of Kansas, seeking for the foreclosure of a certain indenture of mortgage or deed of trust, dated December 1, 1880, known as the General Consolidated Mortgage of the said Missouri, Kansas and Texas Railway Company. That a portion of the line of railway and property owned by the said Missouri, Kansas and Texas Railway Company, and subject to the lien of said General Consolidated Mortgage, is in this district and within the jurisdiction of this court.

Your orator respectfully refers to said bill of complaint for a more particular statement of the contents thereof and for the terms and conditions of the said General Consolidated Mortgage, and your orator filed herewith a true copy of said bill of complaint, and prays that your honors will take the same as a part of this ancillary bill; your orator making all the averments and showing unto your honors the same facts which are set forth in said bill filed as aforesaid. And your orator further shows that all the statements contained in said bill are true, as it is informed and verily believes, and it repeats the same herein.

And your orator makes the same persons defendants in this case that are named in said bill filed as aforesaid, and prays process against said defendants as in said bill they have already prayed.

And your orator prays that your honors will make such orders and decrees preliminary and final as are prayed for in said bill by your orator in the circuit court of the United States for the district of Kansas, and that your honors will also make all such other and necessary orders, judgments and decrees as may be required in aid of said bill, and that your honors will take ancillary jurisdiction with the said circuit court of the United States for the district of Kansas, and will give your orator all the relief which may be necessary to accomplish the purposes of filing said bill.

And your orator prays in all respects as in said bill set forth, and prays such other and further relief as the nature of the case may require and to your honors seem meet.

ALEXANDER & GREEN,

Solicitors for Complainant in said Bill.

THOMAS H. HUBBARD,

JOHN J. MCCOOK,

WILLIAM W. GREEN,

Of Counsel.

UNITED STATES OF AMERICA, }  
Southern District of New York. } ss.

Edward L. Montgomery, being duly sworn, says: That he is the vice-president of the Mercantile Trust Company, the complainant in the foregoing bill of complaint; that he has read the same and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others he believes them to be true.

That in regard to all matters and things in the foregoing bill of complaint alleged which are not within the personal knowledge of this deponent, the deponent has been fully informed and he believes that the same are true.

EDW. L. MONTGOMERY.

Sworn to before me this 5th day of June, 1888.

[SEAL.] HENRY P. BUTLER,

U. S. Commissioner for the Southern Dist. of N. Y.

*Supplemental Ancillary Bill for Foreclosure of Railway Mortgage.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, AT WACO.

THE MERCANTILE TRUST COMPANY,  
Complainant,

vs.

THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY.

*To the Honorable Judges of said Court, sitting in Equity:*

Now comes the Mercantile Trust Company, complainant in the above-entitled and numbered cause, and brings, with the leave of the court first had and obtained, this, its supplementary ancillary bill, to the original ancillary bill filed by it in this cause on the 20th day of June, 1888, and making all the averments and showing unto your honors the same facts which are set forth in said original ancillary bill, further shows and alleges:

That since the filing of said original ancillary bill the Hon. David J. Brewer, judge of the circuit court of the United States for the district of Kansas, in the eighth circuit, to wit, on the 25th day of September, 1888, made his certain decree in the case of the Mercantile Trust Company, Trustee, Complainant, v. Missouri, Kansas and Texas Railway Company and Missouri Pacific Company, Defendants, referred to and set forth in said original ancillary bill filed herein, ordering, adjudging and decreeing that George A. Eddy and Harrison C. Cross be appointed receivers of the property of the Missouri, Kansas and Texas Railway Company, covered by the mortgages made by the said defendant, which are sought to be foreclosed in the said original bill of the Mercantile Trust Company, complainant, with power, among other things, to take possession of all the said mortgaged property, and to operate and cause to be operated the said railroad mortgaged as aforesaid, and to preserve and protect all of the said mortgaged property, acting in all things under the order of the said honorable circuit court of the United States for the district of Kansas, or of such other courts as may entertain jurisdiction of parts of the said mortgaged property as ancillary to the jurisdiction of said circuit court of Kansas; and with leave to the complainants and defendants, and each of them, to apply to any other United States circuit court for such order or orders in aid of the primary jurisdiction vested in said circuit court of Kansas in said cause as may have ancillary jurisdiction therein. A certified copy of which order is attached hereto and made a part hereof; and complainant further shows and alleges

that said George A. Eddy and Harrison C. Cross, named as receivers aforesaid, have qualified as such, in the manner required by the terms of said decree of date September 25, 1888, and on the 1st of November, 1888, took possession of the said property and are now operating and causing to be operated the said railroads, mortgaged as aforesaid, including such property and railroads as are situated within the State of Texas.

Complainant now renewing its prayer made in said ancillary bill filed on the 25th of June, 1888, prays that your honors will make such orders and decrees preliminary and final as are prayed for in said bill by complainant in the circuit court of the United States for the district of Kansas, and that your honors will also make such other and necessary orders, judgments and decrees as may be required in aid of said bill, and that your honors will take ancillary jurisdiction with the said circuit court of the United States for the district of Kansas, and will give complainant all the relief which may be necessary to accomplish the purposes of filing said bill.

And complainant prays in all respects as in said bill set forth, and prays such other and further relief as the nature of the case may require and to your honors seem meet.

ALEXANDER & GREEN,

Solicitors for Complainant in said Bill.

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*Decree Taking Ancillary Jurisdiction.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, IN THE FIFTH CIRCUIT, AT  
WACO.

THE MERCANTILE TRUST COMPANY,	}
TRUSTEE, Complainant,	
vs.	
THE MISSOURI, KANSAS AND TEXAS	
RAILWAY COMPANY, AND THE	}
MISSOURI PACIFIC RAILWAY	
COMPANY <i>et al.</i> , Defendants.	

On this 14th day of November, 1888, came on to be heard the original and supplemental ancillary bill filed by complainant in this cause, and the court having considered the same, and it appearing to the court that the Mercantile Trust Company, trustee, complainant herein, has already filed in the circuit court of the United States for the district of Kansas, the court having jurisdiction of the Missouri, Kansas and Texas Railway Company, a corporation having its principal office in the State of Kansas, a bill of complaint against said Missouri, Kansas and Texas Railway Company and against the Missouri Pacific Railway Company, a corporation existing under the laws of the State of Missouri and of said State of Kansas, asking for the foreclosure of a certain indenture of mortgage, dated December 1, 1880, known as the general consolidated mortgage of the said Missouri, Kansas and Texas Railway Company, a true copy of which bill of complaint is now on file in this cause. And it further appearing that in said cause now pending in the said circuit court of the United States for the district of Kansas,

the Hon. David J. Brewer, United States circuit judge for the eighth circuit, including said district of Kansas, on June 9, 1888, made his order and decree sustaining complainant's application for a receiver, and afterwards, to wit, on the 25th day of September, 1888, made his further order and decree naming and appointing George A. Eddy and Harrison C. Cross receivers of the property of the Missouri, Kansas and Texas Railway Company, covered by the mortgages made by the said company which are sought to be foreclosed in the said original bill of the Mercantile Trust Company, complainant, with certain powers and under certain instructions, as fully appears in said order, a certified copy of which is attached to the complainant's supplemental ancillary bill filed herein; and

It further appearing that a portion of the line of railway and property owned by the said Missouri, Kansas and Texas Railway Company, and subject to the lien of said general consolidated mortgage, is in this district and within the jurisdiction of this court, and that by the terms of said order of date September 25, 1888, said complainant was authorized to apply to any other United States circuit court of competent jurisdiction for such order or orders in aid of the primary jurisdiction vested in said United States circuit court for the district of Kansas as may take ancillary jurisdiction of said cause; and

It further appearing that the said George A. Eddy and Harrison C. Cross have qualified as such receivers by taking and subscribing the oath of office and executing and filing bond in the manner and according to the terms of the ninth paragraph of said order and decree:

Now, the court being fully advised, and being moved thereto by the solicitors of complainants,

It is ordered, adjudged and decreed that this court take ancillary jurisdiction with the circuit court of the United States for the district of Kansas in said cause now pending in said court, wherein the said Mercantile Trust Company, trustee, is complainant, and the said Missouri, Kansas and Texas Railway Company and said Missouri Pacific Railway Company are defendants.

It is further ordered, adjudged and decreed that the said order made by the said circuit court of the United States for the district of Kansas, of date June 9, 1888, sustaining the application of complainant for a receiver, and also the said order and decree of said court made on the 25th of September, 1888, naming and appointing George A. Eddy and Harrison C. Cross receivers of the property of the Missouri, Kansas and Texas Railway Company, covered by the mortgages made by the said company, which are sought to be foreclosed in the original bill of the Mercantile Trust Company, with certain powers and under certain instructions, be and the same are hereby ratified, approved and confirmed, and the said George A. Eddy and said Harrison C. Cross are hereby vested with the same powers, rights and privileges as are conferred by said order of said circuit court of the United States for the district of Kansas, of date September 25, 1888, over that portion of the line of railway and property owned by the said Missouri, Kansas and Texas Railway Company, subject to the lien of the mortgages made by said company sought to be foreclosed as aforesaid, as is in this district and within the jurisdiction of this court. And the said receivers having already

taken and subscribed the oath of office, and executed bond in the manner prescribed by the order and decree of said circuit court of the United States for the district of Kansas, of date September 25, 1888, they are hereby authorized to take possession of said property and to act as such receivers without taking further oath of office or executing further bond.

It is further ordered and decreed that the complainants cause to be filed in this court certified copies of all orders of a general nature in any way affecting the said property situated within the jurisdiction of this court made by the said circuit court of the United States for the district of Kansas in said primary cause pending in said court, for the information of the court and all persons who may be interested in said cause.

It is further ordered that the clerk of this court enter on the minutes of the court the copy of the said order of said circuit court of the United States for the district of Kansas, of date September 25, 1888, immediately following the entry of this order and decree.

DON A. PARDEE, Circuit Judge.

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*Appearance of Defendant to Ancillary Bill.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, AT WACO.

THE MERCANTILE TRUST COMPANY	}
Complainant,	
vs.	
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY <i>et al.</i> , De-	
fendants.	

On this, the rule-day in January, 1889, come the defendant, the Missouri Pacific Railway company, one of the defendants in the above-entitled cause, and enter this its appearance in the ancillary bill filed in said cause in this court.

BAKER, BOTTS & BAKER,

Of Counsel for Missouri Pacific Railway Company, Defendants.

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*Stipulation as to Answers to Ancillary Bill.*

CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN  
DISTRICT OF TEXAS, IN THE FIFTH CIRCUIT.

THE MERCANTILE TRUST COMPANY,	}
TRUSTEE, Complainant,	
vs.	
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY <i>et al.</i> , De-	
fendants.	

It is hereby stipulated and agreed on the part of the solicitors for the defendant, the Missouri, Kansas and Texas Railway Company, to take notice

as of this date of the ancillary proceedings herein in Missouri and Texas without service of subpoena, and that answers therein will be filed on the January rule-day, 1889.

Dated New York, December 8, 1888.

ALEXANDER & GREEN,

Solicitors for Complainant.

SIMON STERNE and

E. ELLERY ANDERSON,

Solicitors for Defendant, Missouri, Kansas and Texas Ry. Co.

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*Answer of Defendant to Ancillary Bill of Foreclosure.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, IN THE FIFTH CIRCUIT, AT  
WACO.

THE MERCANTILE TRUST COMPANY,  
Complainant,

vs.

THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY *et al.*, De-  
fendants.

The Missouri, Kansas and Texas Railway Company, a corporation created by and existing under and by virtue of the laws of the State of Kansas, now, and at all times hereafter, saving and reserving unto itself all and all manner of benefit of exception which can or may be had or taken to the many errors, uncertainties and imperfections in the said ancillary bill of complaint, for answer unto the said ancillary bill, or unto so much thereof as this defendant is advised it is material or necessary for it to make answer unto, answering saith:

This defendant admits that the complainant, the Mercantile Trust Company, is a corporation created by and existing under and by virtue of the laws of the State of New York; and that it is a citizen and resident of the said State of New York, and that it has heretofore filed in the circuit court of the United States for the district of Kansas its bill of complaint against the defendants, the Missouri, Kansas and Texas Railway Company, and that in and by the said bill of complaint a foreclosure of a certain indenture of mortgage or deed of trust dated December 1, 1880, and known as the General Consolidated Mortgage of this defendant, is sought to be foreclosed. But for the allegations and averments of the said bill, and for the legal sufficiency and effect thereof, this defendant refers to the said bill when the same shall be produced herein, and denies any and all the averments of the said ancillary bill herein in anywise contrary to or inconsistent therewith.

This defendant, further answering, admits, on information and belief, that a portion of its line of railway and property is in this district and within the jurisdiction of this court, but it neither admits nor denies that

the said property, or any part thereof, is covered by or subject to the lien of the said General Consolidated Mortgage, and on this behalf it leaves the complainant to make such proof as it may be advised.

The defendant, further answering, refers to its answer to the said original bill of complaint as heretofore duly filed in the office of the clerk of the circuit court of the United States for the district of Kansas, and files herewith a true copy and prays that your honors will take the same as a part of its answer herein. And the defendant further shows that the statements contained in the said answer were, as it is informed and believes, verily true when the same was verified and filed herein as aforesaid, and it repeats all of the said allegations, and says that the same are now true, except so far as they may have been modified by this litigation, and by circumstances transpiring since said answer was filed. And the defendant claims the same benefit from the said answer as aforesaid as if it had pleaded to all the several matters therein stated or any of them, or as if it had demurred to the said bill or to this ancillary bill.

All of which matter and things the said defendant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

THE MISSOURI, KANSAS AND TEXAS RAILWAY CO.,  
BY HENRY K. ENOS, 1st Vice Presid't.

Attest:

[L. S.] H. B. HENSON, Secretary.

UNITED STATES OF AMERICA. } ss.  
Southern District of New York. }

Henry K. Enos, being duly sworn, says: That he is the first vice-president of the Missouri, Kansas and Texas Railway Company, defendant herein; that he has read the foregoing answer and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others he believes them to be true.

That in regard to all matters and things in the foregoing answer alleged which are not within the personal knowledge of this deponent, the deponent has been fully informed, and he believes that the same are true.

HENRY K. ENOS.

Sworn to before me this 2d day of January, 1899.

[SEAL]

JOSEPH A. WELCH,

U. S. Commissioner for the Southern Dist. N. Y.

*Replication of Complainant.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, AT WACO.

THE MERCANTILE TRUST COMPANY,	}
TRUSTEE, Complainant,	
vs.	
THE MISSOURI, KANSAS AND TEXAS	
RAILWAY COMPANY, AND THE	}
MISSOURI PACIFIC RAILWAY	
COMPANY, Defendants.	

The replication of the Mercantile Trust Company, complainant, to the answers of the defendants, the Missouri, Kansas and Texas Railway Company and the Missouri Pacific Railway Company —

This repliant, saving and reserving unto itself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answers, for replication thereunto says that it will aver, maintain and prove its said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answers of the said defendants are uncertain, untrue and insufficient to be replied to by this repliant. Without this, that any other matter or thing whatsoever in the said answers contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

ALEXANDER & GREEN,  
Complainant's Solicitors.

*Appearance of Solicitor for Complainant.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, AT WACO.

THE MERCANTILE TRUST COMPANY,	}
TRUSTEE, Complainant,	
vs.	
THE MISSOURI, KANSAS AND TEXAS	
RAILWAY COMPANY <i>et al.</i> , De-	}
fendants.	

*To the Clerk of said Court:*

You are hereby authorized and requested to enter our appearance in the above-entitled cause as solicitors for the complainant—The Mercantile Trust Company of New York.

Very respectfully,

PHILLIPS & STEWART,

Nos. 810, 811 and 812 Bank of Commerce Building, St. Louis, Mo.



*Order Appointing Special Master.*

CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN  
DISTRICT OF TEXAS, AT WACO.

THE MERCANTILE TRUST COMPANY,	}
Complainant,	
vs.	
THE MISSOURI, KANSAS AND TEXAS	
RAILWAY COMPANY <i>et al.</i> , De-	}
fendants.	

## ANCILLARY BILL.

It having been represented to the court that claims are arising in Texas against the receivers appointed and confirmed in this case, growing out of the operations of the railway property in Texas, for stock killed, personal injuries, damages to freight, damages for short delivery, etc.; and it appearing to the court that such claims will constantly arise during the pendency of the receivership in this case, and that such claims should be adjudicated, settled and paid without requiring the parties interested to seek relief from the United States circuit court in Kansas, having original jurisdiction:

It is therefore ordered by the court that Eugene Marshall, Esq., be and he is hereby appointed special master in chancery for this cause; and

It is further ordered that all claims for damages of every kind that may arise against the receivers, growing out of their operation of the Missouri, Kansas and Texas Railway in Texas, may be filed and presented to said special master, who shall examine and report thereon in due course.

That the special master is directed to give reasonable public notice of this order, and is authorized to hold sessions pending examination of claims at such points as he may designate.

He shall report his conclusions to the court from time to time, and such reports shall stand confirmed, unless excepted to within thirty days from the filing thereof, upon proper order entered according to the rules in the chancery order book.

June 22, 1889.

DON A. PARDEE, Circuit Judge.

*Official Oath of Special Master.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, AT WACO.

THE MERCANTILE TRUST COMPANY,	}
TRUSTEE, Complainant,	
vs.	
THE MISSOURI, KANSAS AND TEXAS	
RAILWAY COMPANY <i>et al.</i> , De-	}
fendants.	

I, Eugene Marshall, having been appointed special master in chancery in the above-entitled cause, do solemnly swear that I will faithfully and im-

partially discharge and perform all the duties incumbent upon me as such special master in chancery, according to the best of my skill and ability, agreeably to the constitution and laws of the United States; so help me God.

EUGENE MARSHALL.

Subscribed and sworn to before me this 25th day of June, A. D. 1889, as witness my hand and official seal at Dallas, Texas.

[SEAL.]

CHAS. H. LEDNUM,

U. S. Commissioner Northern Dist. of Texas.

*Order to File Amendment and Extending Receivership.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, AT WACO.

THE MERCANTILE TRUST COMPANY,	}
Complainant,	
vs.	
THE MISSOURI, KANSAS AND TEXAS	
RAILWAY COMPANY AND THE	}
MISSOURI PACIFIC RAILWAY	
COMPANY, Defendants.	

This cause came on to be heard upon the application of the complainant for leave to file its amendment to its bill of complaint filed herein heretofore in this cause:

Whereupon, the court being fully advised thereof, said application is hereby granted, and the clerk of the court is directed to file the same as of the date of this order. And upon application of the complainant it is further

Ordered and decreed that the receivership of George A. Eddy and Harrison C. Cross, appointed under a decree heretofore made in this cause, be and the same is hereby extended to and over all the railway and property of the defendants — the East Line and Red River Railroad Company, the Dallas and Wichita Railroad Company, the Dallas and Waco Railroad Company, the Dallas and Greenville Railroad Company, the Gainesville, Henrietta and Western Railway Company, the Taylor, Bastrop and Houston Railway Company, and the Trinity and Sabine Railroad Company; and that the said George A. Eddy and Harrison C. Cross be and they are hereby appointed receivers of all said railways and the properties thereof, with all the powers and authority mentioned in, and subject to all the terms and conditions of said decree appointing them receivers in this suit.

And the said receivers are hereby authorized to defend any action pending, or which may be brought, seeking to establish claims, liens or demands against the Missouri, Kansas and Texas Railway Company and the above-named railway companies, or either of them, or the property of either of them, and to prosecute any action already brought against any corporation or person for the recovery of any moneys or property due said railway company or either of them.

September 18, 1889.

DON A. PARDEE, Circuit Judge.

*Amendment to Bill of Complaint.*IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, AT WACO.

*To the Honorable the Judges of the Circuit Court of the United States for  
the Northern District of Texas, sitting in Equity, at Waco:*

The Mercantile Trust Company, a corporation created by and existing under the laws of the State of New York, and a resident and citizen of said State, by leave of the court in that behalf first had and obtained, brings this its amended and supplemental bill of complaint against the Missouri, Kansas and Texas Railway Company, a corporation created by and existing under the laws of the State of Kansas, and having its principal office or place of business in the said State, and a citizen and resident of said State, and the Missouri Pacific Railway Company, a corporation of the States of Missouri and Kansas, and a citizen and resident of said States, and the East Line and Red River Railroad Company, the Dallas and Wichita Railroad Company, the Dallas and Waco Railroad Company, the Dallas and Greenville Railroad Company, the Gainesville, Henrietta and Western Railroad Company, the Taylor, Bastrop and Houston Railway Company, and the Trinity and Sabine Railroad Company, each and every of which last-named companies is a corporation created by and existing under the laws of the State of Texas, and a citizen and resident of said State, the said the East Line and Red River Railroad Company having its principal office at Jefferson, Texas, in the eastern district of said State; the Trinity and Sabine Railroad Company having its office at ———, ———, in said eastern district of said State; the said the Dallas and Wichita Railroad Company, the Dallas and Waco Railroad Company and the Dallas and Greenville Railroad Company, each having its principal office at Dallas, Texas, in the northern district of said State; the said the Gainesville, Henrietta and Western Railway Company having its principal office at Gainesville, Texas, in the northern district of said State; and the said the Taylor, Bastrop and Houston Railway Company having its principal office at Houston, Texas, in the western district of said State, and thereupon your orator complains and says:

That heretofore, to wit, on the 26th day of June, 1888, your orator duly made and filed its original bill in this suit against the said the Missouri, Kansas and Texas Railway Company and the said Missouri Pacific Railway Company, to which said original bill this is an amendment, and to which said bill your orator begs leave to refer, and your orator hereby repeats all and singular the allegations and averments in said original bill contained and set forth, and prays that the same may be held and taken as a part of this amendment, in the same manner as if the said allegations and amendments were herein fully and at large set forth.

And your orator further shows unto your honors that by section ninth of the said General Consolidated Mortgage referred to in the bill of complaint herein and filed as Exhibit A in this cause, it was provided that it should be lawful for your orator as trustee to certify and deliver bonds in respect of road constructed or acquired as therein provided to an amount not exceeding \$20,000 a mile, upon the certificates in said section ninth provided for.

That in accordance with said section ninth of said General Consolidated Mortgage your orator has certified and delivered, and there is now actually outstanding in respect of the line of road acquired from the East Line and Red River Railroad Company, two thousand four hundred and eighty bonds, amounting in the aggregate to the principal sum of \$2,480,000; in respect of the line of road acquired from the Dallas and Wichita Railroad Company, seven hundred and eighty bonds, amounting in the aggregate to the principal sum of \$780,000; in respect of the line of road acquired from the Dallas and Greenville Railroad Company, one thousand and forty bonds, amounting in the aggregate to the principal sum of \$1,040,000; in respect of the line of road acquired from the Gainesville, Henrietta and Western Railway Company, one thousand four hundred bonds, amounting in the aggregate to the principal sum of \$1,400,000; in respect of the line of road acquired from the Taylor, Bastrop and Houston Railway Company, two thousand and fifty-five bonds, amounting in the aggregate to the principal sum of \$2,055,000; and in respect of the line of road acquired from the Trinity and Sabine Railroad Company, one thousand three hundred and forty bonds, amounting in the aggregate to the principal sum of \$1,840,000. That said bonds were issued by the said railway company, as your orator is informed and believes, and were certified by your orator, and are outstanding with the knowledge, consent and approval of the several railway and railroad companies hereinbefore referred to, and their officers and stockholders, and each and every of them, and with the intent that all the railroad and property of each and every of them respectively should become and be charged with the lien of said mortgage in favor of your orator, and for the use and the benefit of the holders of said consolidated mortgage bonds, and that ever since the acquisition of said lines as stated in the original bill, and the issuance of the bonds as aforesaid, all of the said railways and properties have been actually operated and managed by and under the direction of the said the Missouri, Kansas and Texas Railway Company, and by the receivers appointed herein, as a part of said railway, with the full approval of all the officers and stockholders and each of them of said companies. That the said railways received the full benefit of all the moneys derived from the sale of all the said bonds so certified and issued as aforesaid, and your orator is advised and believes that by reason of the premises, your orator, in addition to the lien which it acquired by virtue of the several conveyances or transfers of said railroad and property to the defendant, the Missouri, Kansas and Texas Railway Company, acquired and obtained a lien in equity upon all the railways and property in respect of which said bonds were so as aforesaid certified and delivered for the benefit of the holders of all the bonds issued under and secured by said General Consolidated Mortgage. That it was the intention and the purpose of the railway and railroad companies defendants, and each of them, that the said railways and property should be and constitute a further security for the entire issue of bonds secured by said mortgage.

Wherefore your orator prays as it has heretofore prayed in its original bill of complaint, and further, that the several corporations made defendants by this amended bill may answer, but not under oath, such oath being hereby waived, according to the practice of this court, all and singular the matters stated and charged in said original bill and those hereinbefore

stated and charged. That the said General Consolidated Mortgage mentioned in said original bill may be decreed to be a first and primary lien upon all the railroads and properties of the defendants, the Missouri, Kansas and Texas Railway Company, the East Line and Red River Railroad Company, the Dallas and Wichita Railroad Company, the Dallas and Waco Railroad Company, the Dallas and Greenville Railroad Company, the Gainesville, Henrietta and Western Railroad Company, the Taylor, Bastrop and Houston Railway Company, and the Trinity and Sabine Railroad Company, and that the same may be adjudged and decreed to be sold under the decree to be rendered herein. That by such sale and the conveyances to be executed thereupon, the said defendants in the original bill and in this amendment, and all persons claiming or to claim under them or any of them, may be absolutely and forever barred and foreclosed of and from all right, claim, title, lien, possession or equity of redemption of, in or to or in respect to the said railways and properties, and that the proceeds of said sale may be applied in the same manner as is prayed in the original bill herein. That the receivership of George A. Eddy and Harrison C. Cross, under said original bill, may be specifically extended to cover all the railways and properties of the defendants, the East Line and Red River Railroad Company, the Dallas and Wichita Railroad Company, the Dallas and Waco Railroad Company, the Dallas and Greenville Railroad Company, the Gainesville, Henrietta and Western Railway Company, the Taylor, Bastrop and Houston Railway Company, and the Trinity and Sabine Railroad Company, and that the said receivers be vested with all the powers and authority in respect to the said lines of railways and properties with which they are and were vested in respect to the railways and properties of the Missouri, Kansas and Texas Railway Company, by the order herein heretofore entered in this cause, and that your orator may have such other or further order, relief or decree in the premises as this court may deem proper in equity.

And it may please your honors to grant unto your orator writs of subpoena issued out of and under the seal of this honorable court, directed to the defendants above named, thereby notifying them at a certain time and under a certain penalty to be and appear personally before this honorable court, and then and there to answer all and singular the matters contained in and set forth in this original bill and in this amendment, and to stand and abide by and perform such order, direction or decree as shall be made herein as to your honors may seem meet and agreeable to equity and good conscience.

And your orator will ever pray, etc.

THE MERCANTILE TRUST COMPANY,  
By ALEXANDER & GREEN, and  
PHILLIPS & STEWART,  
Solicitors.

THOS. H. HUBBARD,  
W. W. GREEN,  
Of Counsel.

UNITED STATES OF AMERICA, }  
Northern District of Texas, at Waco. }

J. W. Phillips, being duly sworn, states that he is one of the counsel for the Mercantile Trust Company, complainant in the foregoing amendment

to its bill of complaint; that he has read the same and knows the contents thereof; that the allegations therein are true to the best of his knowledge, information and belief.

J. W. PHILLIPS.

Sworn to and subscribed before me this 27th day of September, 1889.

[SEAL.]

J. H. FINKS, U. S. Commissioner.

*Order to Print the Records in the Cause.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, AT WACO.

THE MERCANTILE TRUST COMPANY,  
Trustee, Complainant,

vs.

THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY, AND THE  
MISSOURI PACIFIC RAILWAY  
COMPANY *et al.*, Defendants.

Upon motion of the complainant, it appearing to the court that the bill filed in this cause against the defendants is pending in this court and in divers other courts within this circuit and in the State of Texas, seeking the same relief; it further appearing that part of the property of the defendant, the Missouri, Kansas and Texas Railway Company, and other defendants named in the amended bill filed herein, is within the northern district of Texas, it is

Ordered, adjudged and decreed, That upon complainant's filing in this court a copy of the orders made by the United States circuit court for the district of Kansas, at Topeka, the court having primary jurisdiction in this cause, the filing thereof shall be a sufficient compliance with the orders made heretofore requiring such orders to be filed pending the receivership and the prosecution of this cause. It is further

Ordered, That the clerk of the said court at Waco be ordered, and he is hereby authorized and directed, to cause to be printed the records in the above-entitled cause, including the general orders made herein from time to time, printing the same by successive paging, and in as nearly chronological order as is convenient, and that in printing the same he do not duplicate the orders made by the United States circuit court for the district of Kansas, which have, by orders of said court, been printed and filed in this court, but that when necessary he refer to them by reference to case No. 6181 in equity, pending at Topeka, giving the page in said record of said printed order. It is further

Ordered, That said clerk cause to be sent to the counsel representing the complainant and the defendants in said cause two copies to each firm as the same are printed, and two copies to each of the receivers and their counsel. It is further

Ordered, That the receivers in said cause pay all proper bills for the printing herein ordered as the same may become due from time to time, and they have credit for such disbursements in their accounts.

September 18, 1889.

DON A. PARDEE, Circuit Judge.

*Petition of Defendant for an Order Authorizing Receivers to Deliver to it the Possession of Railway Property in Their Hands.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF TEXAS, IN THE FIFTH CIRCUIT, AT WACO, TEXAS.

THE MERCANTILE TRUST COMPANY,	}
Complainant,	
vs.	
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY <i>et al.</i> , De-	
fendants.	

The petition of the Missouri, Kansas and Texas Railway Company, defendant herein, respectfully shows to this court:

*First.*—That this is a cause ancillary to the main suit between the same parties, in the circuit court of the United States for the district of Kansas.

*Second.*—That in the said main suit the Missouri, Kansas and Texas Railway Company hath heretofore presented its petition praying for an order of the court requiring the receivers of the Missouri, Kansas and Texas Railway to turn over and deliver possession of the said railway and property to the said Missouri, Kansas and Texas Railway Company; and that prior to the submission of the petition the receivers filed a report, and that upon the said petition and report the court did, upon the 8th day of June, 1891, enter an order conformably to the prayer of the said petition, and that copies of the said petition, and of the said report and order of court, are hereto annexed and marked respectively Exhibits A, B and C, and made a part hereof.

Wherefore, your petitioner prays that the said order of the court may be spread upon the records in this court, and may be by this court confirmed and approved, and made the order of this court in this ancillary cause so far as the same may be necessary in order to protect all the rights of all the parties in interest as against the property within the jurisdiction of this court.

MISSOURI, KANSAS & TEXAS RAILWAY CO.

By J. WALDO, 3d Vice-President.

Attest:

[SEAL.] H. B. HENSON, Secretary.

SIMON STERNE,

CHARLES F. BEACH, JR.,

Solicitors for M. K. & T. Ry. Co.

STATE OF NEW YORK, }  
City and County of New York. }

H. B. Henson, being duly sworn, deposes and says: That he is the secretary of the Missouri, Kansas and Texas Railway Company, petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others he believes them to be true.

That in regard to all matters and things in the foregoing petition alleged

which are not within the personal knowledge of this deponent, the deponent has been fully informed, and he believes that the same are true.

H. B. HENSON.

Sworn to before me this 6th day of June, 1891.

[SEAL.] JOHN A. HILLERY,

Notary Public, N. Y. Co.

### *Order on Foregoing Petition.*

AT A STATED TERM OF THE CIRCUIT COURT OF THE UNITED STATES, HELD IN AND FOR THE DISTRICT OF TEXAS, IN THE FIFTH CIRCUIT, AT THE FEDERAL COURT ROOMS, IN THE CITY OF WACO, UPON THE 18TH DAY OF JUNE, 1891.

Present: The Hon. DON A. PARDEE, Judge.

THE MERCANTILE TRUST COMPANY,  
Complainant,

vs.

THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY *et al.*, De-  
fendants.

It appearing to the court, by certified copy herewith filed, that in the main suit between the same parties in the circuit court of the United States for the district of Kansas, to which this cause is ancillary, there was duly entered, on the 8th day of June, 1891, the following decree:—

At a stated term of the circuit court of the United States, held in and for the district of Kansas, in the eighth circuit, at the federal court rooms, in the city of Leavenworth, upon the 8th day of June, 1891.

Present: The Hon. DAVID J. BREWER, Justice.

THE MERCANTILE TRUST COMPANY,  
Complainant,

vs.

THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY *et al.*, De-  
fendants.

IN EQUITY.

A decree having been entered in this suit upon the 22d day of April, 1890, wherein and whereby it was, among other things, ordered, adjudged and decreed that the Missouri, Kansas and Texas Railway Company should, on or before the expiration of thirty days from the date of said decree, pay into this court, or into the hands of a depository to be named by this court, to the credit of this suit, for the use and benefit of the holders of the bonds and unpaid coupons secured by the mortgage of December 1, 1880, and the several mortgages and the certain indenture supplemental thereto, the sum of thirty million three hundred and ninety-three thousand nine hundred and eighty dollars (\$30,393,980), together with the amount of interest accrued or to accrue on the said bonds from the 1st day of December, 1889, to the time of such payment, and also a sum of money sufficient in addition to defray the costs of this action.



On reading and filing a satisfaction piece dated the 14th day of October, 1890, duly executed, acknowledged and delivered by the Mercantile Trust Company of the three certain indentures of mortgage dated respectively December, 1890, December 1, 1896, and December 1, 1897, and a certain other satisfaction piece dated the 14th day of October, 1890, duly executed, acknowledged and delivered by the Mercantile Trust Company of a certain indenture dated March 1, 1883, being the same mortgages and indenture referred to and described in the bill of complaint herein, by which said satisfaction pieces the Mercantile Trust Company certifies that the three mortgages and the certain indenture as aforesaid, and the bonds secured by the same, are paid and satisfied, and consents that the said mortgages and the said indenture be discharged of record.

And on reading and filing a stipulation dated May 5, 1891, and signed by the counsel for all parties to this suit, by which it appears that all of the bonds secured by the said mortgages and by the said indenture, and all of the interest due thereon, have been paid by the Missouri, Kansas and Texas Railway Company to the Mercantile Trust Company, trustee, and by which it further appears that the Missouri, Kansas and Texas Railway Company has also paid and discharged all the other sums of money which by the said decree it was required to pay, and by which stipulation it is also consented that a proper order satisfying and discharging the said decree of April 23, 1890, may be entered in this suit.

And on reading and filing the petition of the Missouri, Kansas and Texas Railway Company verified the 7th day of May, 1891, praying that the receivers of the railway and property of the petitioner be upon the 1st day of July, 1891, discharged, and the said railway and property restored to the petitioner.

And on reading and filing the report of the receivers, Messrs. Geo. A. Eddy and Harrison C. Cross, verified on the 5th day of June, 1891, showing, among other things, the total amounts of their receipts and disbursements substantially to the date of the hearing upon the motion for the entry of this decree, containing also a statement of suits now pending against them as receivers, or against the Missouri, Kansas and Texas Railway Company and any of its ancillary companies, and of all claims filed against or presented to said receivers or said railway company so far as they have come to the knowledge of the said receivers, and a general statement of the outstanding liabilities of the said receivers growing out of the possession, operation and management of the property of the Missouri, Kansas and Texas Railway Company by the said receivers.

And Messrs. Geo. A. Eddy and Harrison C. Cross, receivers of all the said property, appearing by James Hagerman, Esq., their solicitor, and the matters and things hereinbefore suggested being submitted to the court, and the court being advised:

Now, on motion of Simon Sterne, Esq., of counsel for the petitioner, the Missouri, Kansas and Texas Railway Company, it is

Hereby ordered, adjudged and decreed as follows:—

1. That the said decree of April 23, 1890, is in all respects satisfied and discharged in so far as the same requires the payment by the Missouri, Kansas and Texas Railway Company of any sums of money. This cause, however, being retained as and for the purposes hereinafter provided.

2. That the Missouri, Kansas and Texas Railway Company has duly and fully paid to the Mercantile Trust Company, trustee, all the sums of money which, by the said decree, was directed to be paid; the said payments amounting to the sum of thirty million three hundred and ninety-three thousand nine hundred and eighty (\$30,393,980) dollars, together with the amount of interest accrued upon the said sum from the 1st day of December, 1889, to the date of the payment thereof; and the said railway has also duly and fully paid to the said Mercantile Trust Company, trustee, and to its counsel, in full, all its and their reasonable commissions, charges, fees and disbursements in the execution of the trust and in the prosecution of the litigation herein, which said several sums and amounts have by it and them been accepted in full for its and their services rendered herein, and the said railway company has also duly and fully paid all costs and allowances which by the said decree were directed to be paid.

3. That on the 1st day of July, 1891, at the hour of noon of that day, Messrs. Geo. A. Eddy and Harrison C. Cross, as receivers, are hereby ordered and directed to deliver to the Missouri, Kansas and Texas Railway Company all the railroads and other property of the said Missouri, Kansas and Texas Railway Company, the Dallas and Wichita Railway Company, the Dallas and Waco Railway Company, the Dallas and Greenville Railroad Company, the Gainesville, Henrietta and Western Railroad Company, the Taylor, Bastrop and Houston Railway Company, the Trinity and Sabine Railroad Company, the Sherman, Denison and Dallas Railway Company, and the Kansas City and Pacific Railroad Company, wheresoever situated, whereof they took possession as receivers, under and pursuant to the orders of this court, and under and pursuant to orders in causes ancillary hereto, and which shall then remain in their possession or under their control, together with all the assets of every name and nature, funds, books and accounts, papers and vouchers in their possession or under their control as receivers; and the said receivers shall, contemporaneously with the delivery of the said railroads and property, assign and transfer to the Missouri, Kansas and Texas Railway Company all the assets, uncollected accounts and choses in action of the said Missouri, Kansas and Texas Railway Company, or of either of the other before-mentioned railway companies remaining in their hands, and which have accrued to them as such receivers from the possession and operation of the said lines of railway or of any of them; and the said Missouri, Kansas and Texas Railway Company, on the day and at the hour aforesaid, to wit, upon the 1st day of July, 1891, at the hour of noon of that day, shall receive and take possession of all the railroads and other properties, real, personal and mixed, and of all the funds and assets, books and accounts, papers and vouchers, claims, demands and choses in action in the hands of Geo. A. Eddy and Harrison C. Cross, aforesaid, receivers of the Missouri, Kansas and Texas Railway heretofore appointed and now acting under orders made in this cause and in the ancillary causes between the same parties pending in the circuit courts of the United States for the eastern and western districts of Missouri, the western district of Arkansas, and the northern, western and eastern districts of Texas; and upon such transfer, assignment and delivery of the property aforesaid by the receivers of the railway company, the property of the said Missouri, Kansas

and Texas Railway Company and of the other companies heretofore mentioned shall become liable for all claims and demands accrued, accruing or to accrue against said receivers arising out of their possession of the said railroads and property which are and have been in their hands or under their control as receivers, including all claims and demands against them arising out of their operation of the East Line and Red River Railroad, which has heretofore been surrendered under orders made in this cause and in the ancillary cause pending in the United States circuit court for the northern district of Texas at Waco, and also all claims and demands existing against said receivers under their receivership by order of appointment made in the cause pending in the United States circuit court for the northern district of Texas at Dallas, wherein the Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, is complainant, and the Missouri, Kansas and Texas Railway Company, the East Line and Red River Railroad Company and others are defendants; and also all the current liabilities of said receivers, and all contracts for which the said receivers are or may be responsible.

4. That the said Missouri, Kansas and Texas Railway Company, and those claiming under them, shall take and receive on said July 1, 1891, the railroads and properties so transferred, assigned and delivered as hereinbefore ordered, subject to all claims, demands and liabilities now existing, or which hereafter may be made against said receivers, arising out of their receivership, and this court reserves and retains jurisdiction over the said railroads and properties, and the said parties hereto and those claiming under them, for the purpose of determining in this cause or having determined in any of the circuit courts of the United States in any of the ancillary causes having ancillary jurisdiction herein, all such claims, liabilities and demands, and for the purpose of fully protecting the receivers against any liability on any claims or demands existing or to exist against them, and for the purpose of protecting those having claims against said receivers.

5. That this cause is retained and kept open for the purpose of ascertaining and determining all claims, demands and liabilities against said receivers, and against the property in their possession and to be surrendered by them, which have arisen or may arise out of their said receivership. All such claims, demands and liabilities, if not paid by the Missouri, Kansas and Texas Railway Company in due course, shall be made and presented by intervention in this cause, or in the causes ancillary hereto, for the purpose of being ascertained and determined in and by such proper intervention proceedings, and any orders, judgments or decrees so rendered in such proceedings may be enforced and shall only be enforced against the property of the said railway company to the same extent that judgments could have been enforced if said property had not been surrendered into the possession of said company, but was still in the possession of said receivers. Such intervention proceedings must be filed in this cause in this court or in any of the circuit courts of the United States having jurisdiction in any of the ancillary causes on or before the 1st day of January, 1892, and after that date no further interventions shall be permitted in this cause, and the rights of any claimant who shall not on or before that date have commenced intervention proceedings to avail themselves of the remedies herein provided

for their benefit shall cease and determine. The receivers shall advertise in daily newspapers published respectively in St. Louis, Kansas City and Sedalia, Missouri; in Parsons, Kansas, and Dallas, Texas, the date of the intended delivery of the said property to the said company, and shall in said advertisement notify all claimants to present their said claims to the Missouri, Kansas and Texas Railway Company, and if the same are not settled or adjusted that then the said claimants shall intervene in the manner aforesaid, and within the time aforesaid, to wit, on or before the 1st day of January, 1892. The said advertisement shall be commenced within five days after the entry of this order, and shall be inserted once a week for three successive weeks.

6. That nothing in this decree contained is intended to affect or shall be construed as affecting the status of any pending or undetermined litigation in which said receivers appear as parties. Such litigations may continue to determination in the name of the receivers, but for the use of the Missouri, Kansas and Texas Railway Company, and at its costs and expense, and with the right to that company, should it be so advised, to appear and be substituted in any such litigation.

7. That on the 1st day of July, 1891, the date fixed for the delivery of the said properties by the receivers to the said railway company, the title or right of possession of Geo. A. Eddy and Harrison C. Cross, receivers, as fixed and determined by the certain order made in this cause dated September 25, 1888, and filed October 8, 1888, and the said title or right of possession as fixed and determined by certain subsequent orders made in this cause extending and continuing the said receivership to the railroads and properties hereinbefore mentioned, shall cease and terminate.

8. That the receivers' quarterly accounts and the reports of John T. Morton, Esq., and Aaron P. Jetmore, Esq., masters, as the same have from time to time been made to this court, which receivers' and masters' reports were respectively filed as follows:

Receivers' report for November and December, 1888, filed March 4, 1889.

Master's report thereon filed May 28, 1889.

Receivers' report for January, February and March, 1889, filed July 22, 1889.

Master's report thereon filed August 29, 1889.

Receivers' report for April, May and June, July, August and September, 1889, filed January 14, 1890.

Master's report thereon filed February 22, 1890.

Receivers' report for October, November and December, 1889, filed March 4, 1890.

Master's report thereon filed April 22, 1890.

Receivers' report for January, February and March, 1890, filed June 20, 1890.

Master's report thereon filed July 24, 1890.

Receivers' report for April, May and June, 1890, filed October 24, 1890.

Master's report thereon filed November 29, 1890.

Receivers' report for July, August and September, 1890, filed January 7, 1891.

Master's report thereon filed February 5, 1891.

Receivers' report for October, November and December, 1890, filed May 1, 1891.

Master's report thereon filed May 6, 1891.

Receivers' report for January, February and March, 1891, filed —.

Master's report thereon filed —.

Are hereby and each of the said receivers' and masters' reports respectively is, in all things, confirmed and approved, the parties having expressly waived the right under the rule to file objections thereto.

9. That the receivers shall file an additional report containing a statement of their receipts and disbursements from the 1st day of April, 1891, to the time of the delivery of the property aforesaid, to wit, July 1, 1891, and simultaneously with its submission to the masters mail a duplicate of said report to the defendant, the Missouri, Kansas and Texas Railway Company, to its New York office, and thereupon, without further order, said report shall stand referred to the master heretofore appointed in this cause, and he shall forthwith proceed to pass upon the same and report to this court. Within five days after such report of the master has been filed, objections, if any, thereto shall be filed, and if no objections are filed thereto the same may be submitted to the court without further notice; and if and when approved the said receivers shall be finally discharged as to an accounting with the Missouri, Kansas and Texas Railway Company and the other companies hereinbefore mentioned, and their bonds canceled and discharged.

10. That the Missouri, Kansas and Texas Railway Company and the said receivers, Geo. A. Eddy and Harrison C. Cross, may apply at the foot of this decree for such other and further relief as may be just.

DAVID J. BREWER, Circuit Justice.

We hereby consent to the entry of the foregoing decree.

MERCANTILE TRUST COMPANY,

By ALEXANDER & GREEN, Solicitors.

MISSOURI PACIFIC RAILWAY COMPANY,

By DILLON & SWAYNE, Solicitors.

It is hereby ordered, adjudged and decreed that the said decree be spread upon the records of this court, and that the said decree be and hereby is approved and confirmed, and made the decree of this court in this ancillary cause so far as the same may be necessary to protect all the rights of all the parties in interest as against the property within the jurisdiction of this court.

DON A. PARDEE, Circuit Judge.

June 18, 1891.

### *Subpœna to Answer Amended Bill, and Return of Service.*

THE UNITED STATES OF AMERICA, CIRCUIT COURT, FIFTH CIRCUIT AND NORTHERN DISTRICT OF TEXAS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To the Taylor, Bastrop and Houston Railway Company, Greeting:

You are hereby commanded to appear personally before the honorable circuit court of the United States for the northern district of Texas, in the fifth circuit, at a court to be holden at the city of Waco, in and for said cir-

quit, on the first Monday of November next, or whensoever the said court shall be there, to answer an amended bill exhibited against you, the Taylor, Bastrop and Houston Railway Company, the East Line and Red River Railroad Company, the Dalton and Wichita Railroad Company, the Dallas and Waco Railroad Company, the Dallas and Greenville Railroad Company, the Gainesville, Henrietta & Western Railroad Company, the Trinity and Sabine Railroad Company, the Missouri, Kansas and Texas Railroad Company, and the Missouri Pacific Railway Company, by the Mercantile Trust Company, and to do further and receive what the said court shall have considered in that behalf. And this that you are not to omit, under the penalty of \$350.

Witness, the Honorable Melville W. Fuller, chief justice of the Supreme Court of the United States, and the seal of the circuit court of the United States for the northern district of Texas, at the city of [SEAL] Waco, this 28d day of September, 1889, and of the independence of the United States of America the 114th year.

J. H. FINKS, Clerk,

U. S. Circuit Court, Northern District of Texas, at Waco.

By C. A. RICHARDSON, Deputy.

The defendant, the Taylor, Bastrop and Houston Railway Company, is required to enter its appearance in the above suit in the clerk's office, on or before the first Monday of November next, otherwise the bill will be taken as confessed.

J. H. FINKS, Clerk,

U. S. Circuit Court, Northern District of Texas, at Waco.

By C. A. RICHARDSON, Deputy.

#### DIRECTIONS TO MARSHAL.

The marshal will serve this subpoena on J. A. Baker, President, Houston.

J. H. FINKS, Clerk.

By C. A. RICHARDSON, Deputy.

#### MARSHAL'S RETURN.

Received this writ on the 23d day of September, 1889, and I executed the same on the 5th day of October, 1889, by delivering to the within-named defendant, the Taylor, Bastrop and Houston Railway Company, through its president, J. A. Baker, at Houston, in my district, in person a true copy of this writ.

JAS. J. DICKERSON,

U. S. Marshal Eastern District Texas.

By JOHN M. WHELAN, Deputy.

*Notice of Petition.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, IN THE EIGHTH CIRCUIT.

MERCANTILE TRUST COMPANY, Com- plainant,	}	IN EQUITY.
vs.		
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY AND OTHERS.		
Defendants.		

*Notice to the Mercantile Trust Company and the Missouri, Kansas and Texas Railway Company, or Their Solicitors of Record:*

You, and each of you, are hereby notified that the petition of Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, a copy of which is hereto attached and made a part hereof, will be presented in the above-entitled cause to the above-named court, or to one of the judges thereof in chambers, at Topeka, Kansas, on the 21st day of November, 1890, at 10 o'clock in the forenoon of that day, or so soon thereafter as the said court or judge may hear the same, and that said receivers will ask the order of the court thereon at that time.

WARNER, DEAN & HAGERMAN,  
Solicitors for George A. Eddy and H. C. Cross,  
Receivers of the Missouri, Kansas and Texas Railway.

*Petition of Intervention.*

THE UNITED STATES OF AMERICA, CIRCUIT COURT, FIFTH CIRCUIT AND NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,	}
vs.	
THE MISSOURI KANSAS AND TEXAS RAILWAY COMPANY <i>et al.</i> , De-	
fendants.	

*To the Honorable Circuit Court of the Northern District of Texas:*

Your complainant, B. F. Sullivan, who resides in the county of Caldwell, in the State of Texas, praying for leave to intervene in the above styled and numbered cause, and for other orders, respectfully represents to the honorable court that on, to wit, the — day of —, 1888, prior to the order of this honorable court placing the mortgaged property of the said Missouri, Kansas and Texas Railway Company into the control and possession of the receivers, Geo. A. Eddy and H. C. Cross, and prior to the order of the honorable United States circuit court for the district of Kansas placing such property in the control and possession of said receivers, the intervenor herein, said B. F. Sullivan, instituted suit in the justice's court for precinct No. 1, in Caldwell county, Texas, against the Taylor, Bastrop

and Houston Railroad Company, on a claim of seventy dollars for damages for material taken and appropriated by the said Missouri, Kansas and Texas Railway Company in the construction and building of its said railroad; that the Taylor, Bastrop and Houston Railroad Company is and was the Missouri, Kansas and Texas Railway Company constructing, operating, owning and controlling, under the said name of the Taylor, Bastrop and Houston Railroad Company, a line of railway called the Taylor, Bastrop and Houston Railroad, and running from Taylor, in Williamson county, Texas, through Bastrop and Smithville, in Bastrop county, Texas, and into Fayette county, Texas, on in the direction of Houston, in Harris county, Texas, together with a tap or spur running from said town of Smithville, in said Bastrop county, to the town of Lockhart, in the county of Caldwell, State of Texas. That during the pendency of said suit in said justice court said property known as aforesaid as the Taylor, Bastrop and Houston Railroad was by order of the United States circuit court for the district of Kansas, and by order of this honorable court made in this cause, placed in the possession and control of said Geo. A. Eddy and H. C. Cross as receivers as aforesaid. That during the pendency of said suit in said justice court, and after the said order appointing said Geo. A. Eddy and H. C. Cross as receivers as aforesaid, placing said Taylor, Bastrop and Houston Railroad in their possession, in this cause said Geo. A. Eddy and H. C. Cross, receivers, were duly served with citation in terms of law to appear and answer the suit of the said B. F. Sullivan in said justice court, and thereafter, to wit, on the 4th day of January, 1889, said service of citation on said receivers being perfect and complete, said justice court, at and during its regular term thereof, gave judgment in favor of the said B. F. Sullivan for the sum of seventy (\$70) dollars, and for costs of suit, which said cost amounts to the sum of twenty-nine (\$29.73) seventy-three one-hundredths dollars against the said Taylor, Bastrop and Houston Railroad Company and against said Geo. A. Eddy and H. C. Cross, receivers; and said judgment declares and establishes said sum together with said costs as a charge and lien on the earnings of said Taylor, Bastrop and Houston Railroad Company.

And this intervenor says said judgment is a lien of the sixth class on the earnings of said Missouri, Kansas and Texas Railway, and prays an order of this honorable court conferring the same as such lien and for payment thereof by said receivers.

Intervenor attaches hereto, marked "Exhibit A," a true copy of said judgment of said justice court, certified to as being true and correct by S. H. Henderson, said justice trying said cause, accompanied by the certificate of W. W. Carpenter, clerk of the county court of Caldwell county, Texas, under the seal of said county court, that said S. H. Henderson is, and on January 4, 1889, was, a duly elected justice of the peace, and that the signature attached to said copy of judgment is the genuine signature of said justice of the peace, and intervenor asks that the same be taken as a part of this petition.

And the intervenor prays for such further or other orders respecting said claim as may seem to the honorable court equitable, proper and necessary under the facts, and so as in duty bound will ever pray.

D. H. HARDY,

Attorney for Intervenor, B. F. Sullivan.



B. F. SULLIVAN  
vs.  
TAYLOR, BASTROP AND HOUSTON  
RAILROAD COMPANY.

On this 4th day of January, 1889, came the parties plaintiff and defendant by their attorneys and announced themselves ready for trial, and came a jury of good and lawful men of Caldwell county, to wit, J. W. Madry and five others, who, after being duly impaneled and sworn according to law, after hearing the pleadings and evidence in the cause (counsel declining all argument), retired to consider of their verdict, and returning into open court submitted the following report: "We, the jury, find for plaintiff seventy-five dollars, amount of damages claimed. (Signed) J. W. Madry, Foreman." It appearing to the court that the defendant, the Taylor, Bastrop and Houston Railroad Company, is a corporation engaged in constructing its road and operating the same in Caldwell county, Texas; that the said company is justly indebted to the plaintiff, B. F. Sullivan, for damages sustained by him from the appropriation of his earth and soil by said railroad company in the construction of the road-bed of said company in Caldwell county, in the sum of seventy dollars, as found by the jury; that since the institution of this suit said railroad company and corporation as aforesaid has been placed in the hands of the defendants, Geo. A. Eddy and H. C. Cross, as receivers; that said receivers, acting by and through their agent, H. C. Rauson, and others, have possession of all the property of said corporation, and are operating said railroad and business in Caldwell county, Texas, and are receiving all the earnings of said railroad company; that said Geo. A. Eddy and H. C. Cross, receivers as aforesaid, have been duly cited to answer the demand of the plaintiff in this cause. It is therefore ordered and adjudged by the court that plaintiff B. F. Sullivan do have and recover of and from the defendant, the Taylor, Bastrop and Houston Railroad Company, and Geo. A. Eddy and H. C. Cross, receivers as aforesaid, the sum of seventy dollars and all costs of this suit; and a lien is hereby established and fixed in the earnings of said defendant corporation, the Taylor, Bastrop and Houston Railroad Company, which may be now in the hands of said receivers aforesaid or H. C. Rauson, agent of said receivers in Caldwell county, as aforesaid, and in the earnings of said defendant railroad company which may hereafter come into the hands of said receivers and said Rauson, agent of said receivers as aforesaid; and said Geo. A. Eddy and H. C. Cross are hereby directed out of the earnings of said railroad company coming to their hands to pay off and satisfy the judgment herein rendered in favor of said plaintiff, B. F. Sullivan, within thirty days from the date of this judgment. That if said receivers shall fail or refuse to pay off and satisfy said judgment herein rendered in favor of plaintiff B. F. Sullivan within the time as herein directed, then that the said H. C. Rauson, so representing said receivers in Caldwell county as aforesaid, is hereby directed to pay off and satisfy said judgment within sixty days from the date of this judgment out of any money coming to his hands, the earnings of said Taylor, Bastrop and Houston Railroad Company. Upon failure of said receivers and said Rauson to pay off and satisfy the judgment herein given in favor of plaintiff B. F. Sullivan as hereinbefore directed, then let execu-

tion issue against the defendants, the Taylor, Bastrop and Houston Railroad Company and Geo. A. Eddy and H. C. Cross, for the amount unpaid on said judgment. This 4th day of January, 1889.

S. H. HENDERSON,  
J. P. C. Co.

*Motion to Refer Intervention to Special Master.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, AT WACO.

THE MERCANTILE TRUST COMPANY, Complainant,	}	Equity No. 58.
vs.		
THE MISSOURI KANSAS AND TEXAS RAILWAY COMPANY <i>et al.</i> , De- fendants.		

INTERVENTION OF B. F. SULLIVAN.

Now comes B. F. Sullivan, intervenor, by counsel, and moves the honorable court that his petition of intervention filed in the papers of this cause September 17, 1889, be referred in all things to Eugene Marshall, Esq., master in chancery, for his examination and report; and intervenor with respect so prays.

D. H. HARDY,  
Attorney for B. F. Sullivan.

*Another Petition of Intervention.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, IN THE FIFTH CIRCUIT, AT  
WACO, TEXAS.

THE MERCANTILE TRUST COMPANY, Complainant,	}
vs.	
THE MISSOURI KANSAS AND TEXAS RAILWAY COMPANY, THE EAST LINE AND RED RIVER RAILROAD COMPANY, <i>et al.</i> , Defendants.	

THE PETITION OF THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT  
COMPANY OF THE CITY OF PHILADELPHIA, STATE OF PENNSYLVANIA,  
TRUSTEE.

The petition of the Fidelity Insurance, Trust and Safe Deposit Company respectfully shows:—

*First.*—Your petitioner is a corporation duly incorporated, organized and existing under the laws of the State of Pennsylvania, and has been such since long prior to the 1st day of June, 1880.

*Second.*—The defendant, the East Line and Red River Railroad Company, was specially chartered by an act of the legislature of the State of Texas, entitled "An act to organize and incorporate the East Line and Red River Railroad Company," which act was duly approved on March 22, 1871.

*Third.*—On the 1st day of June, 1880, the said East Line and Red River Railroad Company executed its mortgage to your petitioner, as trustee, to secure certain first-mortgage bonds as by said first mortgage provided. A copy of said mortgage is hereto attached, marked "Exhibit A," and made part hereof. By the terms of said mortgage the railroad of said East Line and Red River Railroad Company, and all of its property then existing and to be afterwards acquired, was conveyed to your petitioner, as trustee, to secure certain mortgage bonds in said mortgage particularly described. The number of bonds authorized to be issued under said mortgage was not to exceed six hundred and fifty-one, being at the rate of \$7,000 per mile of railroad constructed at the time of the execution of the said mortgage, and a further issue of \$7,000 per mile as additional road should be constructed in sections not less than ten miles.

*Fourth.*—The railroad of said East Line and Red River Railroad Company is constructed from Jefferson, via Greenville, to McKinney, through the counties of Marion, Cass, Morris, Titus, Camp, Wood, Hopkins, Hunt and Collin, Texas, a distance of about one hundred and fifty-three miles. From McKinney to Greenville it is a standard gauge, and from Greenville to Jefferson it is a narrow gauge.

*Fifth.*—There have been certified and delivered, and are now outstanding, ten hundred and eighty-one of the bonds secured by the said mortgage, but the rights of the holders of seven hundred and thirty-four thereof to share in the protection of the lien of the mortgage is disputed by the holders of the remaining three hundred and forty-seven bonds, as will more fully appear by reference to the sixteenth section of this petition.

*Sixth.*—On the 28th day of November, 1881, the said East Line and Red River Railroad Company executed and delivered to the Missouri, Kansas and Texas Railway Company its certain deed or instrument in writing, whereby it conveyed all of its property to the Missouri, Kansas and Texas Railway Company, defendant herein. The said conveyance was made by virtue of authority claimed by the parties thereto to be conferred by section 4 of an act of the legislature of the State of Texas, approved August 2, 1870, entitled "An act in relation to the Missouri, Kansas and Texas Railway Company, late the Union Pacific Railway Company, Southern Branch," and also by virtue of the charter powers of the East Line and Red River Railroad Company.

*Seventh.*—On December 1, 1880, the said Missouri, Kansas and Texas Railway Company leased all of its lines then owned and thereafter to be acquired to the Missouri Pacific Railway Company.

*Eighth.*—After the Missouri, Kansas and Texas Railway Company acquired the East Line and Red River Railroad, the said railway company turned over, under its lease, the said East Line and Red River Railroad to the Missouri Pacific Railway Company, which was thereafter operated by the said last-named company, under the lease, as a part of the Missouri, Kansas and Texas Railway.

*Ninth.*—On June 8, 1888, a suit in equity was begun in the circuit court of the United States for the district of Kansas by the Mercantile Trust Company of New York, trustee, under the mortgage made by the Missouri, Kansas and Texas Railway Company, to secure certain bonds therein described, to foreclose the said mortgage, and for the appointment of receivers for the said mortgaged property, default having been made in the payment of interest on said mortgage bonds; in which suit the Missouri, Kansas and Texas Railway Company and the Missouri Pacific Railway Company were made parties defendant, duly served and appeared. The bill of complaint and of subsequent pleadings and proceedings in the said United States circuit court for the district of Kansas have been, under the order of this court in this cause, filed herein, and your petitioner begs to refer thereto.

*Tenth.*—On the 8th of October, 1888, in the said cause, an order was entered appointing George A. Eddy and H. C. Cross receivers of the Missouri, Kansas and Texas Railway Company, including all of its properties in Missouri, Kansas, Texas and the Indian Territory, and including the line of railroad hereinbefore referred to as the East Line and Red River Railroad.

*Eleventh.*—On the 28th of June, 1888, the ancillary proceedings in which this petition is now presented were begun by the said Mercantile Trust Company in the circuit court of the United States against the Missouri, Kansas and Texas Railway Company and the Missouri Pacific Railway Company, in each of the districts, viz., the northern, southern and eastern, of the State of Texas, to foreclose the said mortgage of the Missouri, Kansas and Texas Railway Company to the said Mercantile Trust Company, and in aid of the said suit in Kansas, and asking for the appointment of receivers.

*Twelfth.*—On the 26th of November, 1888, an order was made in each of said courts in Texas appointing and confirming the said Eddy and Cross receivers of the Missouri, Kansas and Texas Railway Company, including all of its lines in the State of Texas, among which was the East Line and Red River Railroad.

*Thirteenth.*—Afterwards, on the 7th day of September, 1889, an amended bill was filed in the original suit in the circuit court of Kansas, making certain other railroad companies parties defendant, among which was the East Line and Red River Railroad Company, and an order was made on that day extending the receivership of the said Eddy and Cross, specifically and by name, over certain lines of road in Texas, among them the East Line and Red River Railroad.

*Fourteenth.*—On the 18th of September, 1889, an amended bill was filed in each of the said circuit courts of the United States for Texas, making certain other parties defendant, among whom was the East Line and Red River Railroad Company, and by an order entered in the said cause the receivership of the said Eddy and Cross was specifically extended over certain railroads in Texas, and among them was the said East Line and Red River Railroad.

*Fifteenth.*—By virtue of the original orders appointing them, the said receivers, Eddy and Cross, took possession of all the lines of the Missouri, Kansas and Texas Railway Company, including the East Line and Red River Railroad, on the 1st day of November, 1888, and have since been in

possession of and operating the same, and they are now in possession of and operating said railroads by virtue of the said original orders and aforesaid orders made upon the said ended bills.

*Sixteenth.*— That there were prepared for issue by the said East Line and Red River Railroad Company, and certified by your petitioner, under mortgage of June 1, 1880, ten hundred and eighty-one bonds. Of this three hundred and forty-seven bonds are now outstanding in hands of owners whose title is not in dispute, and they allege that the remaining seven hundred and twenty-seven of said bonds were acquired by the Mercantile Trust Company of New York, trustee, under the mortgage made by the Missouri, Kansas and Texas Railway Company, under such conditions that the said Mercantile Trust Company is not entitled, as against them, to enforce the same as if entitled to the protection of the lien of the mortgage made to your petitioner. A copy of a notice received from the holders of certain of the bonds is hereto attached as Exhibit B. The said East Line and Red River Railroad Company has made default in the payment of the coupons which fell due December 1, 1887, and upon all coupons maturing subsequently thereto.

*Seventeenth.*— Your petitioner has been requested by the said Mercantile Trust Company, as the holder of seven hundred and thirty-four bonds, and also by the holders of the said three hundred and forty-seven bonds, to take steps to protect the rights of the owners of the bonds secured thereby, so that the holders of all of the bonds now outstanding have now united in the request that this action be taken.

*Eighteenth.*— The mortgage of the said East Line and Red River Railroad Company to your petitioner constitutes a prior and paramount lien upon all of the railroads and property of the said East Line and Red River Railroad Company to any claim of the said Mercantile Trust Company or the said Missouri, Kansas and Texas Railway Company, or of any of the other parties to this suit, or to the said foreclosure suit in the said circuit court of the United States for the district of Kansas.

*Nineteenth.*— Your petitioner further shows that in the said mortgage, made and executed by the said East Line and Red River Railroad Company to your petitioner, it is provided as follows:—

“In case of default of the payment of any interest upon said bond, and such default continuing twelve months, the whole principal sum mentioned in each and all of said bonds then outstanding shall, at the option of the holders of one-third in interest of the said bonds then outstanding, become due and payable, and in that event, or in case of default in payment of the principal of said bonds, or any of them, at the maturity of said bonds the party of the second part or its successor or successors in this trust shall foreclose this mortgage by legal proceedings, and sell, or cause to be sold, the said railway and property, and all the rights, privileges and franchises, and all the appurtenances herein conveyed, as above expressed, including lands and land scrip, as well as all the benefit of the equity of redemption of the party of the first part in and to the same, with the benefit of the franchise aforesaid, which sale shall be at public auction in the city of New York, or at Jefferson, Texas, on previous notice of the time and place of such sale by advertisement, published not less than three times per week for ten weeks, in at least two newspapers of general circulation published

in the city of New York, two in the city of Philadelphia, and two in the State of Texas, and in such other places as may be required by law.

Wherefore, your petitioner prays permission to file a bill to foreclose the said mortgage in the United States circuit court for the northern district of Texas at Dallas, and for the appointment of a receiver thereunder, and for such other and further order in the premises as may be necessary to fully protect the rights of the owners of the bonds secured by the said mortgage.

RICHARD C. DALE,

Solicitor for the Fidelity Ins. Trust & S. D. Co.

### *Order Granting Leave to Intervene.*

#### ORDER.

And now this 18th day of February, 1890, the petition of the Fidelity Insurance Trust and Safe Deposit Company being before the court, upon consideration thereof and upon motion of R. C. Dale, solicitor for said petitioner, and W. B. Botts appearing for the East Line and Red River Railroad Company, and Chas. F. Beach appearing for the Missouri, Kansas and Texas Railway Company:—

It is ordered that the prayer of the petitioner be granted, and that the said petitioner have leave to file a bill to foreclose the mortgage referred to in said petition, and for other relief as prayed for in said petition.

DON A. PARDEE, Circuit Judge.

New Orleans, La., February 18, 1890.

### *Master's Report on Intervention.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIFTH  
CIRCUIT AND NORTHERN DISTRICT OF TEXAS, AT WACO,  
TEXAS.

THE MERCANTILE TRUST COMPANY  
et al, Complainants,

vs.

THE MISSOURI, KANSAS & TEXAS  
RAILWAY COMPANY et al, De-  
fendants.

SPECIAL MASTER'S REPORT IN THE MATTER OF THE CLAIM OF J. D. BOYDSTON BROS. & CO. AGAINST THE RECEIVERS OF THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

To the Judges of said Court:

Under a general order of reference, dated June 23, 1889, made in this cause, providing for the examination by the special master of claims against the receivers appointed herein, to wit, H. C. Cross and Geo. A. Eddy, arising from their operation of the defendant railway company's property in Texas—

J. D. Boydston Bros. & Co., a copartnership, doing a general merchan-

dise business at Rockwall, in the county of Rockwall, Texas, filed with me their intervening petition, complaining that on the 24th day of May, 1889, they shipped from Rockwall to St. Louis, in the State of Missouri, over the Missouri, Kansas and Texas Railway, sixty-eight head of beef cattle; that while said beef cattle were *en route* to St. Louis they were injured and delayed, on said railway, to intervenors' damage eight hundred and sixteen (\$816) dollars.

By consent of the parties I appointed the 12th day of February, 1890, at Dallas, to consider the matter. At which time and place appeared W. C. Jones, solicitor for the receivers, and W. B. Wade, solicitor for intervenors.

After hearing the evidence and argument of counsel I took the matter under advisement, and now report my findings:—

I find that the receivers and intervenors executed, on the 24th day of May, 1889, a certain live-stock contract, whereby the former engaged to transport, as common carriers, for hire, sixty-seven head of beef cattle, the property of intervenors, from Rockwall, Texas, to the National Stock-yards in the city of St. Louis, Missouri.

I find that in pursuance of this contract sixty-seven head of beef steers were delivered on the same day to said receivers at Rockwall, Texas, and that they were in good condition, and of the average weight of eight hundred and fifty pounds a head.

I find that thereafter, on the 26th day of May, 1889, while a train operated by said receivers was transporting said cattle from Rockwall, Texas, to St. Louis, Missouri, it was detained by a wreck caused by a derailment of one of its cars, at Fort Scott, Kansas, for twenty-four hours.

I find that said cattle were delivered on the 27th day of May, 1889, to the consignee at the National Stock-yards in St. Louis, Missouri, in bad condition, and greatly injured by the wreck and delay.

I find that the delay was unreasonable, and not without the fault of the receivers, and that if said delay had not occurred the cattle would have been delivered to the consignee on the 27th day of May, 1889, and in good condition, and that intervenors would have received a better price for them than the price offered and received by intervenors for them on the 28th day of May, 1889, the same day when they were sold.

I find that the difference between the value of these cattle, at a fair valuation, on these dates amounts to the sum of six hundred and ten (\$610) dollars.

Premises considered, I am of the opinion that intervenors are entitled to recover the difference between the price they would have received on the 27th day of May, 1889, and the price actually received on the 28th and 29th days of May, 1889.

I therefore recommend the adoption by the court of a decree to the following effect:—

That intervenors, Boydston Bros. & Co., have of and from Geo. A. Eddy and H. C. Cross, as the receivers of the defendant railway company, the sum of six hundred and ten (\$610) dollars, actual damages; the same to be decreed as a charge upon the current income of the receivership, and a part of the expenses thereof, and all costs in this behalf.

Respectfully submitted,

EUGENE MARSHALL,  
Special Master in Chancery.

*Decree Confirming Master's Report on Intervention.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF TEXAS, AT WACO.

THE MERCANTILE TRUST COMPANY	}
<i>et al.</i> , Complainants,	
vs.	
THE MISSOURI, KANSAS AND TEXAS	
RAILWAY COMPANY <i>et al.</i> , De-	}
fendants.	

On this day came on to be heard the exceptions of Intervenor Moses Dennis to the report of the special master filed herein October 17, 1891, and the same was argued by counsel, where upon consideration thereof, because it is the opinion of the court that the law is against said exceptions, it is therefore ordered, adjudged and decreed by the court that said exceptions be and they are hereby overruled, and the report of said special master is in all things confirmed.

March 4, 1892.

A. P. McCORMICK, U. S. District Judge.

*Decree of Foreclosure and Sale of a Railway.*

AT A TERM OF THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE EASTERN DIVISION OF THE SOUTHERN DISTRICT  
OF GEORGIA, HELD AT THE CITY OF SAVANNAH ON THE  
4TH DAY OF JANUARY, 1894.

Present — The Hon. HOWELL E. JACKSON, Circuit Justice, and the Hon.  
EMORY SPEER, District Judge.

THE CENTRAL RAILROAD AND BANK-	}	Consolidated Cause.
ING COMPANY OF GEORGIA		
vs.		
THE FARMERS' LOAN AND TRUST		
COMPANY <i>et al.</i>		
THE FARMERS' LOAN AND TRUST		
COMPANY		
vs.		
THE CENTRAL RAILROAD AND BANK-		
ING COMPANY OF GEORGIA <i>et al.</i>		
ALEXANDER BROWN & SONS	}	
vs.		
THE CENTRAL RAILROAD AND BANK-	}	
ING COMPANY OF GEORGIA <i>et al.</i>		

These causes, having heretofore been consolidated for trial, came on to heard at this term upon the pleadings and proofs, and, all parties being represented by counsel, were full argued, and thereupon, upon consideration



of the equities of the Farmers' Loan and Trust Company, as set out in its bill herein, the court finds and adjudges that the material facts of the said bill are true as therein set forth, and that the said complainant is entitled to the relief therein prayed; and thereupon

It was ordered, adjudged and decreed that the mortgage set forth in the bill of complaint filed herein by the Farmers' Loan and Trust Company, trustee, made by the defendant, the Central Railroad and Banking Company of Georgia, to the said the Farmers' Loan Trust Company, bearing date the 1st day of October, 1872, is a valid and subsisting mortgage, and constitutes a first lien upon the mortgaged premises, property and franchises, described in said mortgage as follows (the words "party of the first part" referring to the Central Railroad and Banking Company of Georgia, and the words "party of the second part" referring to the Farmers' Loan and Trust Company):—

"All and singular the railroad of the said party of the first part lying and being in the State of Georgia, extending from the city of Savannah, to the city of Macon, with a branch from the main line to the city of Milledgeville, being in all about two hundred and eight miles in length, exclusive of turnouts, with all the railways already or hereafter to be constructed, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts and other structures, all depots, station-houses, engine-houses, car-houses, machine-shops and other shops and buildings, and all other property of every description now held or hereafter acquired, including all locomotives, tenders, cars and other rolling stock or equipment, and all machinery, tools, implements, fuel and materials for the constructing, operating and repairing the said railroad or any part thereof, or any of its equipment or appurtenances, whether now held or hereafter to be acquired, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad, or the construction, maintenance or use thereof, now held or hereafter acquired, and all corporate and other franchises which are now or hereafter may be acquired, possessed or exercised by the said party of the first part, and all the income, rents and revenues arising from the same, together with all the rights, members and appurtenances to the said property above described belonging or appertaining, and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law or in equity of the said party of the first part, of, in and to the said property and every part thereof, with the appurtenances."

It was further ordered, adjudged and decreed that the mortgage set forth in the said bill of complaint of the Farmers' Loan and Trust Company, trustee, made by the defendant, the Southwestern Railroad Company, to the said the Farmers' Loan and Trust Company, bearing date the 1st day of October, 1872, is a valid and subsisting mortgage, and constitutes a first lien upon the mortgaged premises, property and franchises, described in said mortgage as follows (the words "party of the first part" referring to the Southwestern Railroad Company, and the words "party of the second part" referring to the Farmers' Loan and Trust Company):—

"All and singular the railroad of the said party of the first part lying and being in the State of Georgia, extending from the city of Macon, in the

State of Georgia, to the cities of Columbus, Eufaula, Fort Gaines and Albany, respectively, in all two hundred and fifty-seven miles in length, exclusive of turnouts, with all the railways already or hereafter to be constructed, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts and other structures, all depots, station-houses, engine-houses, car-houses, machine-shops and other shops and buildings, and all other property of every description now held or hereafter acquired, including all locomotives, tenders, cars and other rolling stock or equipment, and all machinery, tools, implements, fuel and materials for the constructing, operating and repairing the said railroad or any part thereof, or any of its equipments or appurtenances, whether now held or hereafter to be acquired, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad, or the construction, maintenance or use thereof, now held or hereafter acquired, and all corporate and other franchises which are now or hereafter may be acquired, possessed or exercised by the said party of the first part, and all the income, rents and revenues arising from the same, together with all the rights, members and appurtenances to the said property above described belonging or appertaining, and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law or in equity of the said party of the first part, of, in and to the said property and every part thereof, with the appurtenances."

It was further ordered, adjudged and decreed that the mortgage set forth in the said bill of complaint of the Farmers' Loan and Trust Company, trustee, made by the Macon and Western Railroad Company to the said the Farmers' Loan and Trust Company, bearing date the 1st day of October, 1872, is a valid and subsisting mortgage, and constitutes a first lien upon the mortgaged premises, property and franchises, described in said mortgage as follows (the words "party of the first part" referring to the Macon and Western Railroad Company, and the words "party of the second part" referring to the Farmers' Loan and Trust Company): —

"All and singular the railroad of the said party of the first part, lying and being in the State of Georgia, extending from the city of Macon, in the State of Georgia, to the city of Atlanta, being one hundred and three miles in length, exclusive of turnouts, with all the railways already or hereafter to be constructed, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts and other structures, all depots, station-houses, engine-houses, car-houses, machine-shops and other shops and buildings, and all other property of every description now held or hereafter acquired, including all locomotives, tenders, cars and other rolling stock or equipment, and all machinery, tools, implements, fuel and materials for the constructing, operating and repairing the said railroad or any part thereof, or any of its equipments or appurtenances, whether now held or hereafter to be acquired, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad or the construction, maintenance or use thereof, now held or hereafter acquired, and all corporate and other franchises which are now or hereafter may be acquired, possessed or exercised by the

said party of the first part, and all the income, rents and revenues arising from the same, together with all the rights, members and appurtenances to the said property above described belonging or appertaining, and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law or in equity of the said party of the first part, of, in and to the said property and every part thereof, with the appurtenances."

And further, that after the execution and delivery of said last-mentioned mortgage, the said Macon and Western Railroad Company was consolidated with and merged into the Central Railroad and Banking Company of Georgia, which last-named corporation has ever since been the owner of said property.

It was also ordered, adjudged and decreed that the lien of said mortgages and of each of them upon the property therein described respectively, including leasehold interests, extensions, additions and after-acquired property and income therefrom (but not upon shares of stock or bonds of other corporations at any time owned or held by the Central Railroad and Banking Company of Georgia, or upon any shares of stock or bonds mentioned and included in the collateral trust mortgage of May 2, 1887, to the Central Trust Company of New York, trustee), is prior to any other lien in favor of any party to any of the causes above mentioned; that default has been made as hereinafter specified in the payment of both principal and interest due upon the bonds secured by said mortgages, and each of them, so that the Farmers' Loan and Trust Company, as trustee, is entitled to a sale of said mortgaged property, premises and franchises, unless the said defendant mortgagor companies shall pay or cause to be paid, as hereinafter directed, the amount of the entire bonded indebtedness secured by said mortgages, with all costs and expenses of the suit wherein the Farmers' Loan and Trust Company, as trustee, is complainant, as hereinafter specified; that there are jointly and severally secured by the liens of the said mortgages the following amounts of bonds and coupons, with interest thereon, the said bonds and coupons being the joint and several bonds and coupons of the said three mortgagor companies, which bonds and coupons were lawfully issued by said companies, and are the joint and several subsisting obligations of said mortgagor companies, to wit:—

(1) The amount of \$4,999,000 for the principal of said bonds, which became due and payable on the 1st day of January, 1898, with interest on said amount at the rate of seven per centum per annum from the said 1st day of January, 1898;

(2) The amount of \$174,965 for coupons due July 1, 1892, with interest on said amount of said coupons at the rate of seven per centum per annum from said date; also

(3) The amount of \$174,965 for coupons due January 1, 1898, with interest thereon at seven per centum per annum from that date; so that the entire sum due for principal and interest on the said bonds and unpaid coupons up to the 29th day of June, 1898, is the sum of five million five hundred and forty-one thousand two hundred and twenty-six dollars and twenty-five cents (\$5,541,226.25), and the sum of five million three hundred and forty-eight thousand nine hundred and thirty dollars (\$5,348,980) shall bear interest at seven per centum per annum from June 29, 1898, until paid and discharged.

It was further ordered, adjudged and decreed that the mortgage or deed of trust set forth in the answer of the defendant, the Central Trust Company of New York, to the bill of complaint herein, bearing date April 1, 1890, securing payment of the consolidated first mortgage five per cent. gold bonds of the Central Railroad and Banking Company of Georgia (which are outstanding to the amount of \$8,000,000 of principal, par value), is a valid and subsisting mortgage and constitutes a lien to the extent of the amount which shall be ascertained in the manner hereinafter provided to be owing upon the said bonds and the coupons thereunto appertaining to the amount of the debts, for the payment of which said bonds were hypothecated, next after the lien of the mortgages to the Farmers' Loan and Trust Company, upon the property and premises of the Central Railroad and Banking Company of Georgia, described therein as follows:—

"All the right, title and interest of the said Central Railroad and Banking Company of Georgia in and to all its certain lines of railroad lying and being in the State of Georgia, and now built and in operation, as follows:—Commencing at the initial point of said line of railroad of said Railroad and Banking Company in the city of Savannah, in the county of Chatham, State of Georgia, and running thence in a northerly and northwesterly direction through the counties of Chatham, Effingham, Screven, Burke, Jefferson, Washington, Wilkinson, Jones, Bibb, Monroe, Pike, Spalding, Henry, Clayton and Fulton, in said State of Georgia, to the terminal point of said line of railroad in the city of Atlanta, in said county of Fulton. And also, commencing in the town of Gordon, in said county of Wilkinson, at a connection with the line of railroad of said Railroad and Banking Company above described, and running thence in a northerly direction through the counties of Wilkinson and Baldwin, to its terminal point in the city of Milledgeville in said county of Baldwin; together with all the estate, right, title and interest of said Railroad and Banking Company of, in and to the said lines of railroad, and every part and parcel thereof, including all rights of way, road-bed, superstructure, tracks, bridges, trestles, viaducts, side tracks, switches and switching apparatus, turn-tables, water-tanks and signaling apparatus, all terminal facilities of every character, wharves, warehouses, depot grounds, yards, stations, station-houses, engine-houses, coaling stations and machine and repair shops, and all engines, tenders, cars, rolling stock and tools, machinery, materials, supplies and other equipment now held, owned or acquired by it, or which it may hereafter acquire for use in connection with said lines of railroad or either of them."

Leave is given to the Central Trust Company of New York to file a cross-bill to foreclose the said mortgage, to which the said Central Railroad and Banking Company shall within twenty days thereafter file its answer, and such cross-bill and answer are hereby referred to George W. Owens, Esq., as master, to ascertain and report to the court, in order to enable it to render a supplemental decree herein, the amount owing as aforesaid upon the bonds and coupons secured by said consolidated first mortgage (being the amount for which said bonds are hypothecated), and to whom payable, such report to be filed on or before the 1st day of March, 1894.

And it was adjudged that it be referred to George W. Owens, Esq., as master, to ascertain and report to this court, on or before the 1st day of

March, 1894, what after-acquired property, engines, cars, equipment, rolling stock, supplies and materials are in the possession of the receiver herein, and to what particular corporation, or line of railway, the same belong or are appurtenant, to the end that the equipment, supplies, material and appurtenances belonging to each separate parcel may be sold together with and as a part of said mortgaged parcel when offered for sale. Such master shall report as to the earnings and expenses of the several railroads or divisions, and what has been done with the net income, and the amount chargeable to each such railroad or division for deficit in such income account.

It was further ordered, adjudged and decreed that the said defendant, the Central Railroad and Banking Company of Georgia, is insolvent and unable to pay its debts and liabilities.

It was further ordered, adjudged and decreed that unless the parties defendant to said suit of the Farmers' Loan and Trust Company, or some of them, shall, on or before the 1st day of July, 1894, pay to the said the Farmers' Loan and Trust Company, as trustee, in New York City, the following sums, namely: — First, a sufficient sum of money to pay the costs of the said the Farmers' Loan and Trust Company as they shall be taxed, and its compensation as trustee, with such counsel fees and other expenses and disbursements as may be fixed and allowed by the court as entitled to a priority over said mortgage debt; and second, the entire sum due for principal and interest, and interest on unpaid coupons, as hereinbefore fixed and determined, then the said mortgaged premises and property shall be sold as hereinafter directed and without appraisalment or right of redemption, and all the right and equity of redemption of the defendants in said causes, and each and all of them, of, in and to the said mortgaged premises, property, rights, assets and franchises, and every part and parcel thereof, shall be forever barred and foreclosed.

It was further ordered and decreed that if the Central Railroad and Banking Company of Georgia shall fail to pay, or cause to be paid, to the Farmers' Loan and Trust Company, on or before the 1st day of July, 1894, the amounts found herein to be due and to be paid to said trustee on or before said 1st day of July, 1894, together with costs, expenses and allowances, then and in that event any other party to the consolidated causes hereinbefore stated at the caption of this decree may, prior to the sale of said property and franchises of said the Central Railroad and Banking Company of Georgia, described as subject to the lien of said mortgages as herein decreed, pay to the Farmers' Loan and Trust Company the amounts herein found to be due to it in respect to said bonds and mortgages, and shall thereupon become subrogated to all of the rights of the said bondholders and of said Farmers' Loan and Trust Company as trustee under this decree; said Trust Company shall pay over to the respective bondholders the amounts due upon them only upon receipt of their respective bonds and coupons, and said bonds and coupons shall be transferred and be delivered when received by said trustee to the party making such payment, and upon such payment being made to said trustee, the sale of the property and franchises of the said Central Railroad and Banking Company of Georgia, and of said Southwestern Railroad Company, or of either of said companies, so subject to the lien of said mortgages, shall be stayed until the further order of the court.

It was further ordered, adjudged and decreed that if default be made in making either of said payments to the Farmers' Loan and Trust Company on or before said 1st day of July, 1894, then all of said mortgaged premises, and property, real, personal and mixed, rights and franchises, wherever situated, shall be sold as hereinafter provided, and without any appraisal or right of redemption, at public auction, to the highest bidder therefor, at 12 o'clock noon, on the premises, that is to say, at the depot or station-house of the Central Railroad and Banking Company of Georgia, in the city of Macon, in the county of Bibb, in the State of Georgia, on a day to be named by the master commissioner, herein appointed, in his notice of sale; that before making said sale the master commissioner shall publish a notice thereof once in each week for eight weeks in two newspapers published in the city of New York and in one newspaper published in each of the following cities, to wit, Savannah, Atlanta and Macon, in the State of Georgia, and Montgomery, in the State of Alabama.

And further, that the master commissioner making such sale may, either personally or by some person to be designated by him to act in his name and by his authority, adjourn the sale from time to time without further advertisement, but only on the request of the said the Farmers' Loan and Trust Company, as trustee, or its solicitors, or by order of the court, or a judge thereof; and on such request or order he shall make such adjournment.

It was further ordered, adjudged and decreed that each purchaser of a parcel of the property, when the same is struck down to him, shall at once pay the master commissioner, on account of his purchase, the sum of fifty thousand dollars, which shall at once be deposited by him in the depository of this court, subject to the order of the court in this cause, except that a purchaser of the entire property, when offered as a unit, shall so pay one hundred thousand dollars, and a purchaser of one or more leasehold interests, or of a parcel of rolling stock, shall pay twenty-five per cent. of the amount of his bid; all payments to be made in cash or certified checks; that should any purchaser fail to make such payment at once, the mortgaged property and premises struck down to him shall be resold, the court reserving the right to consider such resale as made on account of said proposed purchaser, or as an original sale, but that such sale, under such circumstances, shall be made at once and without further advertisement; and that the payment or deposit received from the successful bidder shall be applied on account of the purchase price, and that such further portions of the purchase price shall be paid in cash as the court may from time to time direct, the court reserving the right to resell the premises and property herein directed to be sold upon the failure of the purchaser or purchasers, his, its or their successors or assigns, to comply within twenty days with any order of the court in that regard; and that the balance of the purchase price may be paid either in money or in bonds or overdue coupons secured by said mortgages of said defendant mortgagor companies to the said the Farmers' Loan and Trust Company, any bonds or overdue coupons secured by said consolidated first mortgage to the Central Trust Company of New York, each said bond and coupon being received for such sum as the holder thereof would be entitled to receive under the distribution herein ordered, and according to the priority herein adjudged.

It was further ordered that George W. Owens, Esq., be, and he hereby is, designated and appointed a master commissioner to make the sale hereby ordered and decreed, and to execute and deliver a deed or deeds of conveyance of the property so to be sold to the purchaser or purchasers thereof on the further order of the court, or of a judge thereof confirming such sale; the court, however, reserving the right, in term time or chambers, to appoint another person such master commissioner with like powers, in case of the death or disability to act of the master commissioner hereby designated, or in case of his resignation or failure to act, or removal by the court, without prejudice to the proceedings theretofore had by him.

It was further ordered and decreed that within sixty days from the confirmation of said sale or sales, and such additional time as the court may hereafter grant, the purchaser or purchasers of said property shall complete payment of the entire amount bid to the said master commissioner, and that on such payment the said purchaser or purchasers shall be entitled to receive a deed of conveyance thereof from the said master commissioner and from other parties as herein provided, and to receive possession of the property so purchased from the parties holding possession of the same.

It was further ordered and decreed that the funds arising from such sale shall be applied as follows:—

“(1) To the payment of all proper expenses attendant upon said sale, including the expense, outlays and compensation of the master commissioner to make said sale, as such expenses, outlays and compensation may be hereafter fixed and allowed.

“(2) To the payment of taxes on the property, such indebtedness of the receiver and such preferential claims and liabilities as the court may charge as liens upon the said mortgaged property, or any part thereof, as prior to the liens of the said mortgages to the Farmers' Loan and Trust Company as trustee.

“(3) To the payment of the costs of said suit of the Farmers' Loan and Trust Company as trustee, and the compensation of the Farmers' Loan and Trust Company for its services, charges and expenses in the execution of its trust under said mortgages, so made to it as aforesaid, and such solicitors and counsel fees and other expenses and disbursements as may be fixed and allowed by this court as entitled to priority over said mortgage debt.

“(4) To the payment of the said bonds and coupons of the defendant mortgagor corporations secured by the said mortgages foreclosed in said cause of the Farmers' Loan and Trust Company as trustee, to the amount hereinbefore specified, with interest, or, if the fund be not sufficient to pay the same, then to the payment of the same *pro rata*; that each of the said bonds shall be presented for payment to the said master commissioner, and shall, if the holder thereof so request, be stamped or indorsed in some way by said master commissioner so as to show the amount that has been paid on account of the same and on account of the coupon interest due thereon, and be returned so stamped or indorsed to the holder thereof; that in case of payment in full of said bonds and coupons, with interest thereon, the same shall be delivered, with payment in full stamped thereon by the master commissioner, to the purchaser or purchasers at the sale, to be held by said purchaser or purchasers as a muniment of title; and

"(5) If after making all the above payments there shall be any surplus, so much of said surplus as shall result from the sale of the property covered by and embraced in said consolidated trust mortgage, shall be applied to the payment of the amounts which shall be found to be owing upon the bonds and coupons secured by said last-mentioned mortgage. Any other surplus arising shall be paid according to the further order of the court in that regard. All questions as to the compensation of the Central Trust Company of New York for its services, charges, expenses, counsel fees and disbursements arising in the execution of its trust under its said mortgage are reserved for further adjudication in such decree as may hereafter be rendered foreclosing such mortgage."

And further, that in case there shall be any deficiency in the amount required to be paid in full of the said several amounts directed and allowed to be paid to said Farmers' Loan and Trust Company, then the said master commissioner shall report to the court the amount of the deficiency, and the Farmers' Loan and Trust Company, as trustee, shall have judgment against the said defendants, the Central Railroad and Banking Company of Georgia and the Southwestern Railroad Company, for the amount due, and shall have execution therefor pursuant to the rules and practice of this court.

It was further ordered and decreed that the property and premises so ordered to be sold as aforesaid be offered for sale by the master commissioner in the following manner, that is to say, that he shall first offer separately for sale all the locomotives, engines, cars and other equipment and rolling stock belonging to the Central Railroad and Banking Company of Georgia, in lots of five engines and one hundred cars; that he next separately offer for sale the railroad, rights, properties and franchises of the Central Railroad and Banking Company of Georgia, being its line of road from Savannah to Atlanta, with all its appurtenances, franchises and supplies; that he next offer for sale each leasehold interest of the Central Railroad and Banking Company of Georgia hereinafter described; that he next separately offer for sale the railroad, rights, properties and franchises of the Southwestern Railroad Company, as described in and covered by its mortgage hereinabove referred to. If the bid received for the property of the Southwestern Railroad Company when offered separately shall exceed one-third of the amount of the indebtedness to the Farmers' Loan and Trust Company, trustee, its costs and expenses and such portion of the receiver's indebtedness and other preferential allowances made by the court as aforesaid as the court shall hold to be chargeable against it, and the separate bids received for the equipment, railroad and leasehold interests of the Central Railroad and Banking Company of Georgia when offered separately shall exceed in the aggregate the other two-thirds of such amount of the indebtedness to said trustee, its costs and expenses, and such portion of the receiver's indebtedness and other preferential allowances made by the court as aforesaid as the court shall hold to be chargeable against said Central Railroad and Banking Company of Georgia, then the property of the Southwestern Railroad Company shall be struck off and sold to the separate bidder thereof, and thereupon the entire railroad property, equipment and leasehold interests of the Central Railroad and Banking Company of Georgia



shall then be offered for sale as a single parcel. If the bid for the whole property of the Central Railroad and Banking Company of Georgia, offered as a single parcel, shall exceed the aggregate of the separate bids for its equipment, railroad and leasehold interests when offered separately, then such bid for the property as a single parcel shall be accepted, and the property struck off and sold to the bidder therefor; but if the separate bids for such property, when offered in separate parcels, shall in the aggregate exceed the bid therefor when offered as a single parcel, then the said bids for the property as separate parcels shall be accepted and the property struck off and sold to the separate bidders therefor.

If the bid received for the property of the Southwestern Railway Company when offered separately shall not exceed one-third of the amount of the indebtedness to the Farmers' Loan and Trust Company, trustee, its costs and expenses, and such portion of the receiver's indebtedness and other preferential allowances made by the court as aforesaid as the court shall hold to be chargeable against it, and the separate bids received for the equipment, railroad and leasehold interests of the Central Railroad and Banking Company of Georgia, when offered separately, shall not exceed in the aggregate the other two-thirds of such amount of the indebtedness to said trustee, its costs and expenses, and such portion of the receiver's indebtedness and other preferential allowances made by the court as aforesaid as the court shall hold to be chargeable against said Central Railroad and Banking Company of Georgia, then all the railroad, equipment and leasehold interests, franchises and appurtenances of the Central Railroad and Banking Company of Georgia, and the railroad, appurtenances and franchises of the Southwestern Railroad Company, shall be offered and sold in one parcel, and the net proceeds thereof, after payment of the amount of the indebtedness to the Farmers' Loan and Trust Company, trustee, its costs and expenses, and such portions of the receiver's indebtedness and other preferential allowances made by the court as aforesaid as the court shall hold to be chargeable against said Central Railroad and Banking Company of Georgia and against said Southwestern Railroad Company respectively, shall be divided between said two railroad companies in proportion to the amounts bid separately for the properties of the said two companies when put up in parcels. If the bid on the properties of the two railroad companies, when thus offered as a single parcel, shall not exceed the aggregate amount of the separate bids for the several properties, then the properties shall be struck off and sold to the separate bidders respectively.

It was further ordered and decreed that the Southwestern Railroad Company, anything herein contained to the contrary notwithstanding, shall, any time prior to the sale of its property, have the right to pay to the complainant, the Farmers' Loan and Trust Company, one-third of the amounts herein decreed to be paid to it, including the portion of all costs, expenses, receiver's indebtedness and preferential charges which shall be decreed to be paid by the Southwestern Railroad Company; and on such payment being made, none of the property or franchises of the said Southwestern Railroad Company shall be sold under the provisions of this decree until and unless the sale of the other properties herein ordered to be sold shall be made, and after such sale there shall prove to be a deficiency in the pay-

ment of the remaining two-thirds of the amounts herein found due to the Farmers' Loan and Trust Company; and then, and in such case, the said property of the Southwestern Railroad Company shall be liable to sale for the payment of such deficiency; and unless within sixty days after the amount of said deficiency shall be ascertained and demanded in writing of said Southwestern Railroad Company by said master commissioner, the said amount of said deficiency shall be duly paid to said the Farmers' Loan and Trust Company, then the said master commissioner shall proceed to advertise and sell the said property of said Southwestern Railroad Company in the same manner as hereinbefore directed for the sale of the said several properties.

It was further ordered and decreed that on such sale, confirmation and conveyance the equity of redemption of each and every of said mortgages, and all persons claiming by and under them, be forever barred and foreclosed, the defendants, the Central Railroad and Banking Company of Georgia, and the Southwestern Railroad Company, and the complainant, the Farmers' Loan and Trust Company, be and they are hereby authorized and directed to execute and deliver, under the direction of the master commissioner, conveyances executed by them respectively by way of confirmation and further assurance of the title of the said purchaser or purchasers, his, its or their assigns, of and to all and singular the mortgaged property and premises, and every part and parcel thereof, of every kind and description, wherever situated, hereby directed to be sold by the master commissioner; and that the form of said conveyance and mode of execution thereof shall be settled and approved by the master commissioner, or by the court or a judge thereof, if any question should arise as to the form and sufficiency thereof; and that such conveyance shall be delivered to said purchaser or purchasers, his, its or their assigns, contemporaneously with the deed or deeds of the master commissioner, and on the exhibition of any such conveyance by the master commissioner the receiver of this court shall yield possession to the purchaser of all property described in such deed.

The following is a description of the mortgaged premises herein and hereby ordered to be sold without appraisal or right of redemption:—

“All and singular the railroad of the Central Railroad and Banking Company of Georgia lying and being in the State of Georgia, extending from the city of Savannah to the city of Macon, with a branch from the main line to the city of Milledgeville, being in all about two hundred and eight miles in length, exclusive of turnouts, with all the railways or extensions or additions constructed on or before October 1, 1872, or thereafter constructed, purchased or owned, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts and other structures; all depots, station-houses, engine-houses, car-houses, machine-shops and other shops and buildings, and all other property of every description held October 1, 1872, or thereafter acquired, including all locomotives, tenders, cars and other rolling stock or equipment, and all machinery, tools, implements, fuel and materials for the constructing, operating and repairing the said railroad or any part thereof, or any of its equipments or appurtenances, whether held October 1, 1872, or thereafter acquired, all of which things are hereby

declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad or the construction, maintenance or use thereof, held October 1, 1872, or thereafter acquired, and all corporate and other franchises which were on or before October 1, 1872, or thereafter acquired, possessed or exercised by the said Central Railroad and Banking Company of Georgia, and all the income, rents and revenues arising from the same, together with all the rights, members and appurtenances to the said property above described belonging or appertaining, and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law or in equity of the said Central Railroad and Banking Company of Georgia, of, in and to the said property and every part thereof, with the appurtenances."

And also:—

"All and singular the railroad formerly of the Macon and Western Railroad Company, now consolidated with and forming part of the Central Railroad and Banking Company of Georgia, lying and being in the State of Georgia, extending from the city of Macon, in the State of Georgia, to the city of Atlanta, being one hundred and three miles in length, exclusive of turnouts, with all the railways constructed on or before October 1, 1872, or thereafter constructed, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts and other structures, all depots, station-houses, engine-houses, car-houses, machine-shops and other shops and buildings, and all other property of every description held by said Macon and Western Railroad Company October 1, 1872, or thereafter acquired by said company or its grantees, or the said Central Railroad and Banking Company of Georgia, including all locomotives, tenders, cars and other rolling stock or equipment, and all machinery, tools, implements, fuel and materials for the constructing, operating and repairing the said railroad or any part thereof, or any of its equipments or appurtenances, whether held by the Macon and Western Railroad Company October 1, 1872, or thereafter acquired by said company or its grantees, or by the Central Railroad and Banking Company of Georgia, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad or the construction, maintenance or use thereof, held by the Macon and Western Railroad Company October 1, 1872, or thereafter acquired by said company, or its grantees, or by the Central Railroad and Banking Company of Georgia, and all corporate and other franchises which were on October 1, 1872, or thereafter acquired, possessed or exercised by the said Macon and Western Railroad Company, or its grantees, or the said Central Railroad and Banking Company of Georgia, and all the income, rents and revenues arising from the same, together with all the rights, members and appurtenances to the said property above described belonging or appertaining, and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law or in equity of the said Macon and Western Railroad Company and the said Central Railroad and Banking Company of Georgia, of, in and to the said property and every part thereof, with the appurtenances."

And also:—

"All and singular the railroad of the Southwestern Railroad Company

lying and being in the State of Georgia, extending from the city of Macon, in the State of Georgia, to the cities of Columbus, Eufaula, Fort Gaines and Albany, respectively, in all two hundred and fifty-seven miles or thereabouts in length, exclusive of turnouts, and also including the branch or extended line to Blakely; and thence across the Chattahooche river to the town of Columbia, in Henry county, in the State of Alabama, and also the branch from Fort Valley to Perry, Georgia, and all other extensions and branches, including all the railways constructed on October 1, 1872, or thereafter constructed, ways, rights of way, tracks, turnouts, depot grounds and other lands, bridges, viaducts, culverts and other structures, all depots, station-houses, engine-houses, car-houses, machine-shops and other shops and buildings, and all other property of every description held October 1, 1872, or thereafter acquired, including all locomotives, tenders, cars and other rolling stock or equipment, and all machinery, tools, implements, fuel and materials for the constructing, operating and repairing the said railroad or any part thereof, or any of its equipments or appurtenances, whether held October 1, 1872, or thereafter acquired, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and all franchises connected with or relating to the said railroad or the construction, maintenance or use thereof, held October 1, 1872, or thereafter acquired, and all corporate and other franchises which were on or before October 1, 1872, or thereafter acquired, possessed or exercised by the said Southwestern Railroad Company of Georgia, and all the income, rents and revenues arising from the same, together with all the rights, members and appurtenances to the said property above described belonging or appertaining, and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law or in equity of the said Southwestern Railroad Company of Georgia, of, in and to the said property and every part thereof, with the appurtenances."

Also, the following property owned by the Central Railroad and Banking Company of Georgia, which is included in the property above described, all of which is subject to the lien of the said mortgages to the Farmers' Loan and Trust Company:—

"One undivided one-half interest of the Central Railroad and Banking Company of Georgia in and to a certain lease of the Macon and Northern Railroad Company, extending from the city of Macon, Georgia, to the city of Athens, Georgia, and also the undivided half interest of said railroad and banking company in the lease made by the Georgia Railroad Company to William M. Wadley, dated May 7, 1881, and by him assigned to the Central Railroad and Banking Company of Georgia June 1, 1881; also

"The leasehold interest of the Central Railroad and Banking Company of Georgia in the Southwestern Railroad, extending from Macon, Georgia, to Columbus, Georgia; from Fort Valley, Georgia, via Albany, to Columbia, Alabama; from Smithville, Georgia, to Eufaula, Alabama; from Cuthbert, Georgia, to Fort Gaines, Georgia; from Fort Valley, Georgia, to Perry, Georgia, said lease being dated June 24, 1869; also

"The leasehold interest of the Central Railroad and Banking Company of Georgia in the Augusta and Savannah Railroad, extending from the town of Millen to the city of Augusta, said lease being dated May 1, 1862; also

"The leasehold interest of the Central Railroad and Banking Company of Georgia in and to a certain lease of the Eatonton Branch Railroad, extending from Milledgeville, Georgia, to Eatonton, Georgia, said lease being dated April 1, 1853; also

"The leasehold interest of the Central Railroad and Banking Company of Georgia in the Mobile and Girard Railroad, extending from the city of Columbus, Georgia, to the city of Troy, Alabama, and southwestward from Troy in the direction of Mobile or Pensacola, said lease being dated September 10, 1886."

It was further adjudged and decreed that it be referred to George W. Owens, Esq., as master, to ascertain and report to this court, with the evidence taken thereon, the nature, amount and description of any bonds, stocks, and any other assets or property, real and personal, owned by said Central Railroad and Banking Company of Georgia, not covered by the lien of the mortgage of the Farmers' Loan and Trust Company aforesaid, and if the same are held in trust, or otherwise hypothecated, pledged or mortgaged, the nature, deed and the amount of the charges thereon, and the interest as well as the ownership thereof, and any and all other matters relating thereto. Said report shall also find which of said stocks and bonds constitute a majority vote in the companies owning any of the railroads, steamship lines or other properties composing the system of said Central Railroad and Banking Company of Georgia, and shall also show what is so controlled by the Central Railroad and Banking Company of Georgia, and its interests in each, to the end that said report of the master may be acted upon by this court according to the rules of practice in equity.

It was further ordered and decreed that at the same time and place when and where said properties covered by said mortgages are sold, said master commissioner shall offer for sale all of the right, title and interest of said Central Railroad and Banking Company of Georgia in each class of said stocks and bonds and real and personal property, said sale to take place under such terms as the court shall hereafter by supplemental decree direct, such sales to be advertised at the same time, in the same manner and for the same period as provided for the advertisement of the properties to be sold under foreclosure of the mortgage of the Farmers' Loan and Trust Company as aforesaid. Said master shall also, at the same time and place, or otherwise, as this court may direct, offer for sale, in such parcels and under such terms as the court may by supplemental decree or order direct, and sell, all of the other property and assets of every description. And it is decreed that the court may make such further orders and decrees as may be necessary to carry out the provisions of this decree.

And the court further ordered that all equities and rights of any parties not hereinbefore specifically adjudged, and the rights and liabilities of the respective railroads and properties on account of earnings and expenses during the receivership as between themselves, be expressly reserved for further adjudication, and that any party in interest may apply to the court by petition, at the foot of this decree, for such other order or relief in the premises as the court may deem just.

And it appearing that written notice of an intention to appeal was given by the Southwestern Railroad Company at the conclusion of the hearing of

June 29, 1893, to its co-defendant, the Central Railroad and Banking Company of Georgia, which has since been renewed, and the latter company has in writing declined to join therein, the court further ordered and decreed that these stand as an order of severance, with the right to the Southwestern Railroad Company to appeal alone, without joining its said co-defendant therein, the time to commence to run from the filing of this decree in the office of the clerk of the court.

Approved January 4, 1894.

HOWELL E. JACKSON, Circuit Justice.

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*Final Decree of Foreclosure and Sale of a Railway.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, IN THE EIGHTH CIRCUIT.

AT THE REGULAR NOVEMBER TERM OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, HELD AT THE COURT-ROOMS IN THE CITY OF TOPEKA, APRIL 21, 1890.

Present — The Hon. — —, Judge.

THE MERCANTILE TRUST COMPANY,  
Complainant,

vs.

THE MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY, AND THE  
MISSOURI PACIFIC RAILWAY  
COMPANY, Defendants.

} IN EQUITY.

This cause came on to be heard at this term on the pleadings, exhibits and evidence taken therein, and on the report of Aaron P. Jetmore, special master; and after hearing Alexander & Green, of counsel for the complainants; Dillon & Swayne, of counsel for the Missouri Pacific Railway Company, and E. Ellery Anderson and Simon Sterne, of counsel for the Missouri, Kansas and Texas Railway Company, on motion of Alexander & Green, solicitors for the complainant,

It is ordered, adjudged and decreed as follows:—

The court finds —

I.

That the Mercantile Trust Company, the complainant, is a corporation created by and existing under the laws of the State of New York, and having its principal office for the transaction of its business in the city of New York, in said State of New York, and is a citizen of the State of New York within the meaning of the laws fixing and determining the jurisdiction of this court.

II.

That the Missouri, Kansas and Texas Railway Company, one of the above-named defendants, is a corporation created and organized under the laws of the State of Kansas, and has its principal office for the transaction of its

business in the city of Parsons, in said State of Kansas, and is a citizen of said State of Kansas within the meaning of the laws fixing and determining the jurisdiction of this court.

### III.

That the Missouri Pacific Railway Company, one of the defendants above named, is a corporation created and organized under the laws of the State of Missouri, and has its principal office for the transaction of its business in the city of St. Louis, in said State of Missouri, and is a citizen of the said State of Missouri within the meaning of the laws fixing and determining the jurisdiction of this court.

### IV.

That the said Missouri, Kansas and Texas Railway Company now owns, and at the time of the commencement of this suit operated through the agency of the Missouri Pacific Railway Company, under the lease herein-after stated, a number of lines of railway situated in the States of Missouri, Kansas and Texas, and in the Indian Territory, with branches extending in various directions within such States and Territories.

### V.

That the said Missouri, Kansas and Texas Railway Company was possessed of and endowed with certain powers, rights, privileges, franchises and immunities, granted by certain acts of congress of the United States and by the legislatures of the States of Missouri, Kansas and Texas; and that, under and in pursuance of the rights, powers and privileges conferred by the said several acts, it acquired the ownership of the said lines of railway hereinafter referred to, and operated the same, or caused the same to be operated for its account by the Missouri Pacific Railway Company.

### VI.

That, on the 1st day of December, 1880, the said Missouri, Kansas and Texas Railway Company made and executed its forty-five thousand bonds, known as general consolidated mortgage bonds, numbered consecutively from one to forty-five thousand, both numbers inclusive, each for the sum of one thousand dollars, bearing date on said 1st day of December, 1880, by the terms of which bonds the said company promised to pay to the holder of each bond, or, in case the same should be registered, then to the registered owner thereof, the sum of one thousand dollars in United States gold coin, of or equal to the then standard value, at its financial agency in the city of New York, forty years after the date of the said bonds; and also promised to pay the interest thereon at the rate of six per centum per annum, payable semi-annually in like gold coin on the 1st days of June and December in each year, on the presentation and surrender of the respective interest coupons annexed to said bonds, at the said financial agency aforesaid.

### VII.

That on the said 1st day of December, 1880, the said Missouri, Kansas and Texas Railway Company, in order to secure the principal and interest of

the said forty-five thousand general consolidated bonds, and of such further issue of bonds as might be issued in conformity with the terms and provisions of the mortgage hereinafter mentioned, made, executed and delivered to the Mercantile Trust Company, the complainant, a certain deed or indenture of trust, or mortgage known as its general consolidated mortgage, whereby it conveyed to the Mercantile Trust Company as trustee, and its lawful successor or successors in the trust created by said trust deed and to its assigns, the property, real and personal, particularly described in the said mortgage, together with the property subsequently acquired by construction, purchase or otherwise, as hereinafter more particularly described.

#### VIII.

That the said Missouri, Kansas and Texas Railway Company was authorized by the acts of congress, and by the acts of the legislatures of the said States of Missouri and Kansas, and particularly by an act of the legislature of the State of Texas, passed August 2, 1870, to extend its railway from Denison, at or near the Red river, in the State of Texas, in the general direction of Waco and Austin, to the Rio Grande, with a view to extending the same to Camargo and to the city of Mexico; and was also by the said act authorized to construct and acquire branches in the said State of Texas, and to purchase, sell and lease, join stocks, unite or consolidate with any connecting railroad company, by and with the approval and consent of a majority in interest of the stockholders in each company, and to acquire and merge into itself all or any part of the property, rights, privileges and franchises of such other company upon such terms and conditions as might be agreed upon by the respective boards of directors of the said several companies.

#### IX.

That the property particularly described in said mortgage of December 1, 1880, is as follows:—

“*First.*— All and singular the railroad, as the same is constructed and operated, extending from Junction City, in Davis county, and State of Kansas, down the valley of the Neosho river, through the counties of Davis, Morris, Lyon, Coffee, Woodson, Allen, Neosho and Labette, to a point on the southern boundary line of said State, between the Neosho river and the western boundary of Labette county, a distance of one hundred and eighty-two miles, more or less.

“ And also all the right, title and interest which the Missouri, Kansas and Texas Railway Company has, by reason of the construction of said line of road, to and in any land or lands heretofore conveyed by any act of congress to the State of Kansas to aid such construction, the said lands being the same, or so much thereof as remain unsold at the date of the said mortgage, which were granted by acts of congress to the State of Kansas, and by said State to the Union Pacific Railway, Southern Branch, as set forth in a certain mortgage executed by the Missouri, Kansas and Texas Railway Company to the Union Trust Company, bearing date February 1, 1871, to which reference is hereby made, and also all the right, title and interest of the said Missouri, Kansas and Texas Railway Company in and to the pro-



ceeds of such of said lands as may have been sold, which heretofore belonged to the said railway company, or in which the said company was in any way interested, and which are now unexpended and unapplied; and also all the right, title and interest of the said Missouri, Kansas and Texas Railway Company in and to any proceeds of lands granted to the State of Kansas by act of congress entitled 'An act to appropriate the proceeds of the sale of public lands, and to grant pre-emption rights,' approved September 4, 1841, and heretofore sold by said State, under and by virtue of an act of the legislature of the State of Kansas entitled 'An act providing for the sale of public lands to aid in the construction of certain railroads, approved February 23, 1866; and also all the right, title and interest of the Missouri, Kansas and Texas Railway Company in and to such of the lands granted by the act of congress aforesaid which were heretofore sold and conveyed by the State of Kansas to the Land Grant Railway and Trust Company, and by said company to the Missouri, Kansas and Texas Railway Company, together with all and singular the tenements, hereditaments, rights, privileges, easements, income, advantages and appurtenances to the said lands and premises belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title and interest, property, claim and demand whatsoever, at law or in equity, of the said Missouri, Kansas and Texas Railway Company, of, in and to the same, and any and every part or parcel thereof situate in the State of Kansas.

"*Second.*—Also all and singular the said line of railroad, constructed and operated from the southern boundary line of the State of Kansas, southerly through the Indian Territory, to the northern boundary line of the State of Texas, to a point at or near the town of Denison, in said State, a distance of two hundred and fifty miles, more or less, and also all the right, title and interest which the Missouri, Kansas and Texas Railway Company then had, or might thereafter acquire by reason of constructing the extension of the said line of railroad through the Indian Territory, in and to any lands granted by the acts of congress aforesaid, or which the said Missouri, Kansas and Texas Railway Company then had, or might thereafter acquire under and by virtue of a treaty or treaties from any Indian nation or tribe, or otherwise howsoever, appertaining to the aforesaid extension, together with all the rights, privileges, tenements, hereditaments and appurtenances that may belong or appertain thereto; the land granted under said acts of congress being ten alternate sections of land on each side of said railroad.

"*Third.*—All and singular the railroad, as the same is now constructed, extending from Sedalia, in Pettis county, in the State of Missouri, to the western boundary of said State, a distance of one hundred miles, more or less, being the railroad acquired by the Missouri, Kansas and Texas Railway Company by purchase from the Tebo and Neosho Railroad Company.

"*Fourth.*—All and singular the railroad which the Missouri, Kansas and Texas Railway Company acquired from the Labette and Sedalia Railway Company, which is now constructed from the town of Parsons, in Labette county, in the State of Kansas, on the main line of the railroad of the Missouri, Kansas and Texas Railway Company, northeasterly through Labette,

Neosho, Crawford and Bourbon counties, to the boundary line, where the same intersects the railroad acquired by the said Missouri, Kansas and Texas Railway Company from the Tebo and Neosho Railroad Company as aforesaid, a distance of sixty-one miles, more or less.

"*Fifth*.—All and singular the railroad constructed from the town of Holden, on the Missouri Pacific Railroad, in the county of Johnson, State of Missouri; thence into and through the municipal township of Camp Branch, and into and through the municipal township of Grand River, and into and through the corporate limits of the city of Harrisonville, in Cass county; and thence to the western boundary line of the State of Missouri, in the direction of the town of Paola, in the State of Kansas, a distance of about thirty-eight miles, together with all lands, tenements and hereditaments acquired or to be acquired for rights of way for the said portion of railroad hereby conveyed, and all the appurtenances thereto belonging, and also all lands acquired and appropriated, or to be acquired and appropriated, for depots, superstructures, buildings, erections and fixtures on the said line of railroad, and all tracks, bridges, viaducts, culverts, fences and all houses and buildings thereon or appertaining thereto.

"*Sixth*.—So much of the line of railway heretofore belonging to the Neosho Valley and Holden Railway Company, and heretofore consolidated and made one corporation with and under the name of the Missouri, Kansas and Texas Railway Company, as extends from the point on the eastern boundary line of the State of Kansas, where the said Neosho Valley and Holden Railway Company crosses said boundary line from Cass county, Missouri, to the town of Paola, Kansas, a point on the line of said road distant fifteen miles westerly from said boundary line, together with all lands, tenements and hereditaments acquired or to be acquired for rights of way for the said portion of the railroad hereby conveyed, and all appurtenances thereto belonging, and all lands acquired and appropriated, or to be acquired or appropriated, for depots, superstructures, buildings, erections and fixtures on the said line of railroad, and all tracks, bridges, viaducts, culverts, fences, and all houses and buildings thereon or appertaining thereto.

"*Seventh*.—All and singular the railroad of the said Missouri, Kansas and Texas Railway Company now constructed and in operation, extending from Sedalia in the State of Missouri, northerly to Moberly in said State, a distance of seventy-two miles, being a part of the railroad of the Tebo and Neosho Railroad Company, conveyed to the said Missouri, Kansas and Texas Railway Company, more particularly described in the first additional mortgage made by the said Missouri, Kansas and Texas Railway Company to the Union Trust Company, dated June 1, 1872, to which reference is hereby made, together with all the rights, powers, privileges and franchises belonging or in anywise appertaining thereto.

"*Eighth*.—The entire railroad of and belonging to the said Missouri, Kansas and Texas Railway Company, situate, lying and being and extending from its eastern terminus in the city of Hannibal in the State of Missouri, westerly through the counties of Marion, Ralls and Monroe, to the town of Moberly in the county of Randolph, as the same has been heretofore and is now constructed, maintained and operated, being seventy miles in length.

"And also all lands and real estate of every kind and nature, and where-

soever the same may be situate, of or belonging to the said Missouri, Kansas and Texas Railway Company, and owned, used, occupied and enjoyed in the construction, maintenance and operation of said last-described railroad, together with all depots, station-houses, freight-houses, car-houses, machine-shops, cattle-yards, all other buildings, erections, tenements, structures and fixtures, and all machinery, tools, rails, ties, tracks, bridges, viaducts, culverts, fences, or other constructions or superstructures to the said railroad belonging or appertaining thereto.

"All of the aforesaid described railroads taken together being about seven hundred and eighty-six miles in length.

"*Ninth*.— And also all the following property, real and personal, then owned, or which might be at any time thereafter acquired, by the said Missouri, Kansas and Texas Railway Company, for the use of any or all of the railroads above described; namely, all the lands, tenements and hereditaments, and right of way, and all lands appropriated for depots, superstructures, buildings, erections and fixtures; and also all tracks, bridges, viaducts, culverts, fences and other structures, depots, engine-houses, car-houses, freight-houses, wood-houses and other buildings; and all machine-shops and other shops; and also all locomotives, tenders, cars and other rolling stock or equipments, and also all machinery, tools, implements, fuel, supplies and materials for constructing, operating, repairing or replacing the said railroads, or any or either of them; and also all corporate and other franchises, powers, rights and privileges now held and owned by the said Missouri, Kansas and Texas Railway Company, pertaining to the said seven hundred and eighty-six miles of constructed road."

That in pursuance of the provisions of the act of the legislature of the State of Texas, passed August 2, 1870, and in conformity with the powers therein contained, the following conveyances were duly made, executed and delivered by the following named respective companies to the Missouri, Kansas and Texas Railway Company:

The East Line and Red River Railroad Company made, executed and delivered a deed of its railroad as constructed or to be constructed, which deed was dated the 28th day of November, 1881.

The Dallas and Greenville Railway Company made, executed and delivered a deed of its railroad as constructed or to be constructed, which deed was dated the — day of —, 1886.

The Dallas and Wichita Railroad Company made, executed and delivered a deed of its railroad as constructed or to be constructed, which deed was dated the 15th day of December, 1881.

The Taylor, Bastrop and Houston Railway Company made, executed and delivered a deed of its railroad as constructed or to be constructed, which deed was dated the 2d day of December, 1886.

The Gainesville, Henrietta and Western Railway Company made, executed and delivered a deed of its railroad as constructed or to be constructed, which deed was dated the — day of November, 1886.

The Missouri, Kansas and Texas Extension Railway Company made, executed and delivered a deed of its railroad as constructed or to be constructed, which deed was dated the 26th day of November, 1881.

The Trinity and Sabine Railway Company made, executed and delivered

a deed of its railroad as constructed or to be constructed, which deed was dated the 9th day of December, 1882. All of the said conveyances were made to the Missouri, Kansas and Texas Railway Company; and by virtue of the same the said company acquired all the right, title and interest of the said respective companies in and to the railroads constructed or to be constructed, their appurtenances and the property, real and personal, described in the said deeds; and that the said railroads and property thereupon became subject to and bound by the lien of the said mortgage of December 1, 1880.

### X.

That under and in pursuance of the authority conferred upon it as stated in the eighth subdivision of this decree, the Missouri, Kansas and Texas Railway Company constructed, or duly and lawfully acquired by purchase, certain lines of railroad and certain branch railroads in the State of Texas in respect of which bonds were issued under the said mortgage of December 1, 1880, as hereinafter stated, and all of which railroads and branches, together with the equipment thereunto belonging and the appurtenances thereunto pertaining, became and now are subject to the lien of said mortgage of December 1, 1880.

The following is a description of the said railroad and of the said branches so constructed, lawfully purchased or acquired in the State of Texas, that is to say: —

(1) Commencing at a point in the boundary line which divides the State of Texas from the Indian Territory, which point is about five miles north of the town of Denison, in Grayson county, and running thence in a southerly direction as the said railroad is constructed through the town of Denison; and thence in a southwesterly direction through Grayson county to Whitesboro, a distance of about twenty-five miles; thence in a westerly direction to Gainesville, and thence in a westerly direction through the counties of Cook, Montague and Clay, to Henrietta in said last-named county, a distance of eighty-six miles, the said railroad from Whitesboro to Henrietta being known as the Gainesville, Henrietta and Western Railway.

(2) All and singular the railroad, as the same is constructed and operated, commencing at Fort Worth, in Tarrant county, and extending thence in a southerly direction through the counties of Johnson, Hill, McClennan and Bell, to Taylor, in Williamson county, a distance of one hundred and sixty-three miles.

(3) All and singular the railroad as the same is constructed and operated, commencing at Taylor and extending thence through the counties of Williamson, Travis, Bastrop and Fayette, to Boggy Creek Tank, a distance of eighty-nine miles, the said railroad being known and designated as the Taylor, Bastrop and Houston Railway.

(4) Also all and singular the line of railroad as now constructed and operated, commencing at San Marcos in Hays county, and running thence easterly to Lockhart, in Caldwell county, a distance of sixteen miles, the said railroad being known as the Lockhart Branch.

(5) Also the line of railroad as now constructed and operated, commencing at Denison, in Grayson county, and running thence in a southeasterly direc-

tion through the counties of Grayson, Fannin, Hunt, Rains, to Mineola, in Wood county, a distance of one hundred and three miles.

(6) Also the line of railroad as now constructed and operated, commencing at Dallas, in Dallas county, and running thence in a northwesterly direction to Denton, in Denton county, a distance of thirty-eight miles.

(7) Also the line of railroad as now constructed and operated, commencing at Dallas, in Dallas county, and running thence in a northeasterly direction through the counties of Rockwall and Collin, to Greenville, in the county of Hunt, a distance of fifty-four miles.

(8) Also the line of railroad as now constructed and operated, commencing at McKinney, in Collin county, and running thence in an easterly direction through the counties of Hunt, Hopkins, Franklin, Camp, Morris and Cass, to Jefferson, in the county of Marion, a distance of one hundred and fifty-five miles.

(9) Also the line of railroad as now constructed and operated, commencing at Trinity, in Trinity county, and running thence in an easterly direction through Polk county to Colmesneil, in Tyler county, a distance of sixty-seven miles, and known as the Trinity and Sabine Railroad.

(10) Also the line of railroad as now constructed and operated, commencing at Echo, on the main line, in Bell county, and running thence in a westerly direction to Belton, in the same county, a distance of seven and fourteen-one-hundredth miles.

All of the aforesaid described railroads, taken together, and described in this subdivision of the decree, being about eight hundred and two (802) miles in length; and also all lands and real estate of every kind and nature and wheresoever the same may be situate in the State of Texas, of or belonging to the said Missouri, Kansas and Texas Railway Company, and owned, used, occupied and enjoyed in the construction, maintenance and operation of the said eight hundred and two (802) miles of railroad, together with all depots, station-houses, freight-houses, car-houses, machine-shops, cattle-yards, and all other buildings, erections, tenements, structures and fixtures, and all machinery, tools, rails, ties, tracks, bridges, viaducts, culverts, fences or other constructions or superstructures to the said railroad belonging or appertaining thereto; and also all locomotives, tenders, cars and other rolling stock or equipments, fuel, supplies and materials for constructing, operating, repairing or replacing the said eight hundred and two (802) miles of railroad, or any part or portion of the same; and also all corporate and other franchises, powers, rights and privileges held and owned by the said Missouri, Kansas and Texas Railway Company and pertaining to the said eight hundred and two miles of constructed road.

## XI.

That on the 1st day of March, 1893, a certain indenture was made, executed and delivered, to which the International Railway Improvement Company was party of the first part, the Mercantile Trust Company was party of the second part, and the Missouri, Kansas and Texas Railway Company was party of the third part. By the said indenture certain equipment and rolling stock therein described was sold, assigned and transferred to the said Mercantile Trust Company, the party thereto of the second part, for the

purpose of bringing under and subjecting to the lien and conditions of the said mortgage of December 1, 1880, all of the property described in and assigned and transferred by the said indenture. The following is a description of the equipment and rolling stock so transferred :—

One thousand (1,000) box cars, numbered from fifty-eight hundred and two (5,802) to sixty-eight hundred and one (6,801), both inclusive, built by the Lebanon Manufacturing Company.

Four hundred (400) coal cars, numbered from thirty-four hundred and fifty-eight (3,458) to thirty-eight hundred and fifty-seven (3,857), both inclusive; four hundred and fifty (450) stock flat cars, numbered from four thousand (4,000) to forty-three hundred and ninety-nine (4,899) and from eight thousand (8,000) to eight thousand and forty-nine (8,049), all inclusive, and one hundred and fifty (150) stock cars, numbered from eight thousand and fifty (8,050) to eighty-one hundred and ninety-nine (8,199), both inclusive, all built by the Lehigh Manufacturing Company.

Ten (10) passenger coaches, numbered from thirty-nine (39) to forty-eight (48), both inclusive, and six (6) baggage cars, numbered from twenty-three (23) to twenty-eight (28), both inclusive, built by the Ohio Falls Car Company.

Fifteen (15) caboose cars, numbered from sixty-two (62) to seventy-six (76), both inclusive, built by the Missouri Car and Foundry Company.

Thirty (30) locomotive engines numbered from one hundred and forty (140) to one hundred and forty-two (142), one hundred and forty-five (145), one hundred and forty-seven (147), two hundred and sixty-five (265) to two hundred and seventy-seven (277), two hundred and eighty-one (281) to two hundred and eighty-three (283), two hundred and eighty-five (285), two hundred and eighty-seven (287), two hundred and ninety (290) to two hundred and ninety-four (294), two hundred and ninety-six (296), and two hundred and ninety-seven (297), all inclusive.

Thirty-seven (37) hand and thirty-three push cars. Also the following described additional rolling stock acquired through the Missouri, Kansas and Texas Railway Co., viz :—

Ten (10) box cars numbered from eight hundred and eighty-four (884) to eight hundred and ninety-three (893), both inclusive; twenty (20) flat cars, numbered from forty-nine hundred and forty-one (4,941) to forty-nine hundred and sixty (4,960), both inclusive; two (2) combination passenger cars numbered thirty-seven (37) and thirty-eight (38); two (2) caboose cars numbered fifty-three (53) and fifty-four (54), three (3) locomotive engines, numbered from ninety-six (96) to ninety-eight (98), both inclusive.

One hundred and fifty (150) box cars, numbered from five hundred and eighty-four (584) to seven hundred and thirty-three (733), both inclusive; fifty (50) stock cars, numbered from thirteen hundred and fifty-one (1,351) to fourteen hundred (1,400), both inclusive; fifty (50) flat cars, numbered from forty-eight hundred and sixty-six (4,866) to forty-nine hundred and fifteen (4,915); twenty-five (25) coal cars, numbered from forty-nine hundred and sixteen (4,916) to forty-nine hundred and forty (4,940), both inclusive; ten (10) cabin cars, numbered from forty-one (41) to fifty (50), both inclusive, and twenty (20) locomotive engines, numbered from sixty-eight (68) to seventy-seven (77), and from seventy-nine (79) to eighty-eight (88), all inclusive.

## XII.

That by the twelfth section of the said mortgage of December 1, 1880, it was mutually agreed by and between the parties thereto that if the said Missouri, Kansas and Texas Railway Company should, in addition to the roads and branches contemplated by the said mortgage and provided for therein, determine, under any right or franchise owned by it, or which it might thereafter acquire, to still further extend its road into Mexico or elsewhere, or build branches of its road, or become the owner or permanent lessee of any other railroad already constructed, then, for every such extension and branch and every such railroad constructed or to be constructed or acquired or permanently leased, a further issue of bonds in addition to the forty-five million dollars mentioned and provided for in the said mortgage of December 1, 1880, might be made under the said mortgage by the said Missouri, Kansas and Texas Railway Company; provided, however, that the aggregate amount of the said bonds should not exceed the rate of twenty thousand dollars for every mile of road thus constructed, acquired or leased.

It was also in the same section provided that the Missouri, Kansas and Texas Railway Company should execute and deliver to the Mercantile Trust Company, as trustee, its successor or successors, upon any such further issue of bonds, any further reasonable and necessary trust deed to bring in and subject to the condition of the said mortgage of December 1, 1880, every such extended or future-acquired road and every other land or property, real or personal, that might thereafter be acquired by the said railway company for the purpose and with the intent of securing the payment of the said bonds, composing every such increase of issue, as well as the bonds which had theretofore been issued, equally and alike upon the property of the said Missouri, Kansas and Texas Railway Company, and also to secure the interest due and to grow due on the said bonds or any of them in the same manner as if all said bonds had been originally secured by one and the same indenture.

## XIII.

That on the 1st day of December, 1886, an indenture was made, executed and delivered by the Missouri, Kansas and Texas Railway Company to the Mercantile Trust Company, by which the said Missouri, Kansas and Texas Railway Company granted, bargained and conveyed to the said Mercantile Trust Company, as trustee, and for the purpose of bringing in the property in the said indenture described, and subjecting the same to the lien of the said mortgage of December 1, 1880, the following described railroads and property; that is to say:—

*First.*—All and singular the railroad and property of the Taylor, Bastrop and Houston Railroad Company, extending from Taylor, in Williamson county, in the State of Texas, in a southeasterly direction by way of the town of Elgin, through the counties of Williamson, Travis and Bastrop, to the town of Bastrop, and thence through the counties of Bastrop, Fayette, Colorado, Austin, Waller and Harris, to the city of Houston, in said State of Texas, a distance of one hundred and sixty-two miles, more or less.

*Second.*—All and singular the railroad and property of the Dallas and Greenville Railway Company, extending from Greenville, in Hunt county,

in said State of Texas, in a southwesterly direction to the city of Dallas, in Dallas county, in said State, a distance of fifty-two miles, more or less.

*Third.*—All and singular the railroad and property of the Gainesville, Henrietta and Western Railway Company, extending from Gainesville, in Cook county, in said State of Texas, in a westerly direction, through the counties of Cook, Montague, Clay and Archer, to a point at or near the center of Taylor county, in said State, a distance of one hundred and thirty miles, more or less.

*Fourth.*—And all and singular the railroad and property of the Dallas and Waco Railway Company, extending from Dallas, in Dallas county, in said State of Texas, in a southwesterly direction through the counties of Dallas, Ellis, Hill and McLennan, a distance of ninety miles, more or less, as the same shall be located and constructed; but the title to the said railroad and property of the Dallas and Waco Railway Company never was actually conveyed to the Missouri, Kansas and Texas Railway Company, and no bonds have ever been issued under the said mortgage of December 1, 1880, on account of any portion of the said Dallas and Waco Railway Company.

The property thereby conveyed included all and singular the rights of way of such railways and branches above described, and the parcels of land constituting said rights of way and all additions thereto, which might be thereafter acquired by the said Missouri, Kansas and Texas Railway Company, and all depots, depot grounds, tracks, station-houses, engine-houses, car-houses, freight-houses, wood-houses, work-houses, machine-shops and all locomotives, tenders, cars and other rolling stock or equipments, and all rails, ties, chairs, machinery, tools and other implements used for operating and repairing said railroads and branches or any part thereof, together with all the equipments or appurtenances whatsoever thereunto belonging, whether then held or thereafter acquired, and all franchises connected with or relating to said railroads or branches, or the construction, maintenance or use thereof, with all rights, powers, privileges, franchises, immunities and exceptions of every kind and nature appertaining to the said Missouri, Kansas and Texas Railway Company in connection therewith, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, in law as well as in equity, present or prospective, of the said Missouri, Kansas and Texas Railway Company in and to the same, and every part and parcel thereof, with the appurtenances.

#### XIV.

That under and in pursuance of the powers and franchises of the said company hereinbefore described, and in conformity with the terms of the said mortgage of December 1, 1880, the said Missouri, Kansas and Texas Railway Company also acquired the right and title to two certain branch railroads with the property and appurtenances thereto belonging, situated in the Indian Territory and described as follows:—

The first branch beginning at Atoka, a point on the main line of the said railroad in Indian Territory, and extending thence in a northwesterly direction about seven miles to the Lehigh Coal Mines.



The second of the said branches commencing at McAlester, a point on the main railroad of the said company in the Indian Territory, and extending thence in an easterly direction a distance of five miles to the Osage Coal Mines.

Both of the said branches are subject to the lien of the said mortgage of December 1, 1880, and form part of the security of the bonds issued under the same.

#### XV.

That on the 1st day of December, 1887, the Missouri, Kansas and Texas Railway Company made, executed and delivered to the said Mercantile Trust Company, as trustee, a further indenture whereby it granted, bargained, sold, assigned and transferred to the said Mercantile Trust Company, as trustee, the property and equipments in the said indenture described for the purpose of bringing the same under and subjecting the same to the lien of the said mortgage of December 1, 1880.

The following is a description of the property and equipments so transferred:—

Eight hundred (800) box cars, numbered from 9,000 to 9,799, both inclusive, built by the Missouri Car and Foundry Company of St. Louis, Missouri.

Five hundred (500) coal cars, numbered from 5,000 to 5,499, both inclusive, built by the Barney and Smith Manufacturing Company of Dayton, Ohio.

Two hundred and fifty (250) stock cars, numbered from 8,300 to 8,449, both inclusive, built by the said Missouri Car and Foundry Company of St. Louis, Missouri.

Twenty-five (25) passenger coaches, numbered from 50 to 74, both inclusive, built by the Gilbert Car Manufacturing Company of Troy, New York.

Ten (10) combinations cars, numbered from 75 to 84, both inclusive, built by the said Gilbert Car Manufacturing Company.

Twenty (20) locomotive engines, numbered from 501 to 520, both inclusive, built by the Baldwin Locomotive Works of Philadelphia, Pennsylvania.

#### XVI.

That bonds numbered from 1 to 18,217, both inclusive, were reserved and set aside by the terms of the said mortgage of December 1, 1880, and were to be issued and used only in exchange for bonds equal in amount, and which, at the time of the execution of the mortgage, were outstanding under the following underlying or divisional mortgages which were prior liens on part of the premises which were made subject to the lien of the said mortgage of December 1, 1880; that is to say, bonds issued under the mortgage of the Union Pacific Railway Company, Southern Branch; bonds issued under the mortgage made by the Tebo and Neosho Railroad Company; bonds issued by the Hannibal and Central Missouri Railroad Company; bonds issued under the consolidated mortgage of February 1, 1871, and the mortgages additional thereto, dated respectively June 1, 1872, November 1, 1872, and June 1, 1873. None of the said bonds numbered from 1 to 18,217, both inclusive, have ever been exchanged for any of the said underlying or divisional bonds, and none of the said bonds are outstanding or entitled to

share in any portion of the proceeds of the mortgaged premises which may arise out of any sale to be had under the provisions of this decree.

Bonds numbered from 18,218 to ———, both inclusive, amounting in the aggregate to \$9,381,000, have been issued under the said mortgage of December 1, 1880, for the purpose of retiring income bonds issued under a certain mortgage made by the said Missouri, Kansas and Texas Railway Company, dated April 1, 1876, and for the further purpose of retiring the coupons or scrip certificates representing interest accrued thereon. The said bonds are now outstanding and bear interest secured by coupons annexed to the said bonds at the rate of five per centum per annum. Each coupon represents six months' interest for the period immediately preceding its date.

Bonds numbered 28,218 to 46,495, both inclusive, were issued from time to time for the purpose of paying for construction of railroad and for the acquisition of the same, forming the main line, and the extensions and branches of said railroad hereinbefore described and situate in the State of Texas; and also for the purpose of securing and acquiring the new equipment and rolling stock hereinbefore referred to. Of the said bonds \$17,924,000 are now outstanding and bear interest secured by coupons annexed to the said bonds at the rate of six per centum per annum. Each coupon represents six months' interest for the period immediately preceding its date.

#### XVII.

That on the 4th day of May, 1881, a certain indenture of lease, dated the 1st day of December, 1880, between the Missouri, Kansas and Texas Railway Company, party of the first part, and the Missouri Pacific Railway Company, party of the second part, was made, executed and delivered. Under and by virtue of the terms of this lease the defendant, the Missouri Pacific Railway Company, operated all the railroads of the Missouri, Kansas and Texas Railway Company, together with its branches and leased lines, from at or about the date of the lease until the 1st day of November, 1888, when the possession of the said railroads was transferred and delivered to George A. Eddy and Harrison C. Cross, the receivers appointed in this cause. The said lease to the Missouri Pacific Railway Company is subsequent to the said mortgage of December 1, 1880, and is subject to its lien.

By the terms of the said lease the Missouri Pacific Railway Company undertook and agreed to apply the earnings of the said railroad to the payment of operating expenses, fixed charges and other obligations of the Missouri, Kansas and Texas Railway Company specified in the said lease; and it was further provided that if the net earnings or revenues should not be sufficient to provide for the fixed charges on the demised property, the lessee might elect either to advance the funds required from time to time to pay the interest on bonds and other fixed charges, or said lessee might elect not to advance any such deficit; and in that event it was provided that when the interest on the first and general consolidated mortgage bonds and underlying bonds should have remained unpaid for a period of six months, the Missouri, Kansas and Texas Railway Company might thereupon elect to terminate the lease and to receive back the property on the payment of any balance of indebtedness then due from it to the lessee.

The said net revenues were not sufficient to provide for the payment of the said fixed charges during the years 1888 and 1889, and the interest which became due on the first and general consolidated mortgage bonds and underlying bonds on the 1st of July, 1888, on the 1st of August, 1888, on the 1st of January, 1889, on the 1st of February, 1889, and the interest which has become due on the said bonds since those dates, has not been paid, and all of the said interest has remained unpaid for a period exceeding six months, and the said Missouri Pacific Railway Company has elected not to pay the same. The Missouri, Kansas and Texas Railway Company has elected to terminate the said lease to the Missouri Pacific Railway Company, dated the 4th day of May, 1881, and to receive back the said property, and has paid or adjusted all the indebtedness due from it to the Missouri Pacific Railway Company, and the said lease to the Missouri Pacific Railway Company has ceased and determined.

#### XVIII.

That on or about the 1st day of April, 1881, a certain agreement was made, executed and delivered, wherein the Texas and Pacific Railway Company, a corporation organized under the acts of congress of the United States, was party of the first part, and the Missouri, Kansas and Texas Railway Company, the defendant herein, was party of the second part. Under the said agreement the right to the joint use of the track and railroad as constructed between Whitesboro and Fort Worth, a distance of seventy-one miles or thereabouts, under the terms and conditions stated in said agreement, was acquired by the said Missouri, Kansas and Texas Railway Company. That all the rights of the Missouri, Kansas and Texas Railway Company in and under the said contract have been conveyed to the said Mercantile Trust Company and are covered by and subject to the lien of the said mortgage of December 1, 1880.

#### XIX.

That the amount of the indebtedness of the defendant, the Missouri, Kansas and Texas Railway Company, which is secured by liens on the property of the said company, which liens are prior in point of time to the lien of the general consolidated mortgage of December 1, 1880, is as follows:—

A mortgage made by the Union Pacific Railway Company, Southern Branch, dated the 14th day of November, 1868, to Russell Sage and N. A. Cowdrey, as trustees, conveying that part of the railroads hereinbefore described, and extending from Junction City, in the State of Kansas, down the valley of the Neosho river, through the counties of Davis, Morris, Lyon, Coffey, Woodson, Allen, Neosho and Labette, to the State line between the Neosho river and the western boundary of Labette county, together with the rolling stock appertaining to the said railroad; and also all the lands, and claims to lands, which were granted to the State of Kansas by acts of congress of the United States, and subsequently granted by the State of Kansas to the said Union Pacific Railway Company, Southern Branch, or such lands as should thereafter be donated or granted by, or in any other manner obtained from, the United States, or from or through the said State

of Kansas, to aid in building the said railroad of said railway company, or any part of it. The said Union Pacific Railway Company, Southern Branch, subsequently changed its name, and became, and now is, the Missouri, Kansas and Texas Railway Company, the defendant in this action.

Of the bonds issued under the said mortgage of November 14, 1868, there are now outstanding, or in the hands of the trustees thereof, the amount of two million and nine thousand (\$2,009,000) dollars.

The Missouri, Kansas and Texas Railway Company on the 1st day of July, 1868, made default in the payment of the instalment of interest then maturing upon the bonds secured by the said mortgage, and that the said company has made similar defaults on each instalment of interest maturing on said bonds since that date; and that all of the said interest remains due and unpaid. That a majority of the holders of the said bonds have elected, in pursuance of the terms of the said mortgage, that the whole principal sum mentioned in each and all of the said mortgage bonds now outstanding shall forthwith become due and payable, and that the whole amount due on said bonds for principal and for interest is now due and payable.

## XX.

That on or about the 1st day of June, 1870, a mortgage was made by the Tebo and Neosho Railway Company to the Union Trust Company of New York, as trustee, dated June 1, 1870, and that the said mortgage conveyed to the said trustee part of the railroads hereinbefore described, being the railroad as constructed and extending from Sedalia in Pettis county and State of Missouri, to the western boundary of said State, a distance of about one hundred miles; and also the railroad extending from Sedalia, northerly to Moberly, in the State of Missouri, a distance of seventy-two miles.

Certain bonds were issued under the said mortgage, and that after the issue of the same the said Tebo and Neosho Railway Company, by virtue of the power and authority conferred upon it by the statutes of the State of Missouri, conveyed the said railroad, and all the corporate rights and franchises held and owned by the said company, to the Missouri, Kansas and Texas Railway Company, and the said last-named company became the owner thereof, and vested with all the corporate rights, powers and franchises appertaining thereto, subject, however, to the lien of the said mortgage of June 1, 1870.

Of the bonds issued under the said mortgage there are now outstanding bonds to the amount of three hundred and forty-six thousand (\$346,000) dollars. All of the interest which has accrued upon the said bonds has been paid by the receivers in this suit under orders heretofore made, and that the principal sum of the said bond, together with the interest accruing and to accrue thereon, remains due, or to become due, on said bonds.

## XXI.

That the Hannibal and Central Missouri Railway Company made, issued and delivered to the Farmers' Loan and Trust Company, of the city of New York, a certain trust deed or mortgage, bearing date the 20th day of April, 1870, whereby it conveyed to the said trustee part of the railroads hereinbe-

fore described, being the railroad as constructed and extending from Hannibal, in the State of Missouri, to Moberly, in said State, a distance of seventy miles.

Bonds were issued under said mortgage amounting in the aggregate to the principal sum of one million one hundred thousand (\$1,100,000) dollars, which bonds were payable to bearer at the agency of the Missouri, Kansas and Texas Railway Company, in the city of New York, on the 1st day of May, 1890. Of the bonds so issued there are now outstanding bonds to the amount of six hundred and sixty-four thousand dollars (\$664,000). All of the interest which has accrued on the said bonds up to the date of this decree has been paid by the said Missouri, Kansas and Texas Railway Company or by the receivers under orders of this court. The principal of the said bonds is due and payable on the 1st day of May, 1890.

After the issue of the said bonds the Missouri, Kansas and Texas Railway Company purchased and became the owner of the Hannibal and Central Missouri Railroad Company, together with the corporate rights, powers, privileges and franchises and all the property, real and personal, belonging to the said Hannibal and Central Missouri Railroad Company.

#### XXII.

That the said Hannibal and Central Missouri Railroad Company made, executed and delivered to the New York Guaranty and Indemnity Company, of the city of New York, a second trust deed or second mortgage, bearing date the 1st day of February, 1872, whereby it conveyed to the said trustee its railroad hereinbefore described, and the franchises and property, real and personal, thereto belonging.

Bonds were issued under said mortgage to the aggregate principal sum of two hundred and fifty thousand (\$250,000) dollars. All of the interest which has become due on the said bonds up to the date of this decree has been paid by the said company or by the Missouri, Kansas and Texas Railway Company, or by the said receivers under orders of this court; and all the principal sums due on said bonds have been paid, except that there are now outstanding of the bonds so issued an amount of thirty-two thousand (\$32,000) dollars, and the said outstanding bonds, together with the interest accruing and to accrue thereon, will become due and payable on the 1st day of May, 1892.

#### XXIII.

That the Missouri, Kansas and Texas Railway Company made, executed and delivered a mortgage or deed of trust to the Union Trust Company of New York, as trustee, dated February 1, 1871; that by the said mortgage the said Missouri, Kansas and Texas Railway Company conveyed to the said trustee part of the railroad hereinbefore described, and being the railroads of the Missouri, Kansas and Texas Railway Company, in the States of Kansas and in the Indian Territory, excepting therefrom two branch lines in the Indian Territory, one extending from the main line of the said railway to the Osage mines, a distance of five miles, and the other extending from the said main line to the Atoka mine, a distance of seven miles, and also conveying so much of the said railroad in the State of Missouri as then

extended from Sedalia in Pettis county to the western boundary of said State.

Bonds were issued under the said mortgage, and that the same are now outstanding to the aggregate principal sum of ten million four hundred and ninety-three thousand (\$10,493,000) dollars.

#### XXIV.

That the Missouri, Kansas and Texas Railway Company made, executed and delivered to the Union Trust Company of New York, as trustee, an additional mortgage dated the 1st day of June, 1872, and that by the said mortgage the said railway company conveyed to the said trustee part of the railroads hereinbefore described, being the railroad extending from Sedalia northerly to Moberly, a distance of seventy-two miles; and also the railroad extending from Holden to the westerly boundary line of the State of Missouri, a distance of thirty-eight miles; and from the said westerly boundary line to Paola, a distance of fifteen miles; the said last-mentioned railroad being the same railroad which was subsequently leased by the Missouri, Kansas and Texas Railway Company to the Missouri Pacific Railway Company as hereinbefore stated.

Under the said additional mortgage of June 1, 1872, bonds were issued and are now outstanding to the aggregate principal sum of two million four hundred and ninety-eight thousand (\$2,498,000) dollars.

#### XXV.

That the Missouri, Kansas and Texas Railway Company made, executed and delivered to the Union Trust Company of New York, as trustee, a further additional dated the 1st day of November, 1872, and that it was intended by the said mortgage to convey to the said Trust Company a railroad intended to be constructed and built and extending from a point at or near Fort Gibson, in the Indian Territory, southeasterly to Fort Smith, in the State of Arkansas, a distance of eighty miles; but that no portion of the said railroad was ever built or the title thereto acquired, and that no property under the description contained in said mortgage is included in the decree of foreclosure and sale to be entered in this action.

Bonds were issued under the said mortgage and are now outstanding to the aggregate principal sum of one million one hundred and eighty-two thousand (\$1,182,000) dollars.

#### XXVI.

That the Missouri, Kansas and Texas Railway Company made, executed and delivered to the Union Trust Company of New York, as trustee, a further additional mortgage, dated the 1st day of June, 1873, whereby it conveyed to the said trustee part of the railroads hereinbefore described, being the railroad constructed from Hannibal to Moberly, a distance of seventy miles.

Bonds were issued under the said mortgage and are now outstanding to the aggregate principal sum of seven hundred and four thousand (\$704,000) dollars.

All of the bonds issued under the said mortgage of June 1, 1872, November 1, 1872, and June 1, 1873, were issued under and in pursuance of the terms and provisions of the said mortgage of February 1, 1871, and that the said four mortgages in effect constitute one mortgage, and that all the property conveyed in all of the said mortgages was conveyed to the Union Trust Company as trustee for the equal security of all the bonds issued thereunder and now outstanding. That the aggregate amount of all the bonds outstanding under the said four mortgages is fourteen million eight hundred and seventy-seven thousand (\$14,877,000) dollars.

#### XXVII

That on the 1st day of August, 1888, default was made by the Missouri, Kansas and Texas Railway Company in the payment of the six months' interest then due on all of the said bonds; and that defaults in the payment of subsequent instalments of interest have been made by the said company on the 1st days of February, 1889, August, 1889, and February, 1890.

In conformity with the provisions of the said mortgage of February 1, 1871, and of the said mortgage of June 1, 1872, and of the said mortgage of November 1, 1872, and the said mortgage of June 1, 1873, a majority of the holders of all the bonds issued under the said four mortgages have elected that the principal sum thereby secured shall be forthwith due and payable. The whole of the principal of the said bonds, together with all the arrears of interest thereon, is now due and payable, and that the lien of the said principal sum and of the said interest is prior and superior to the lien of the said mortgage of December 1, 1880, as to all the premises hereinbefore referred to and conveyed by the said mortgages of February 1, 1871, June 1, 1872, November 1, 1872, and June 1, 1873.

#### XXVIII

That the Missouri, Kansas and Texas Railway Company made, executed and delivered to the Union Trust Company of New York, as trustee, a certain mortgage or deed of trust dated the 1st day of April, 1876, whereby it conveyed to the said trustee part of the railroads hereinbefore described, and being all the railroads of the said Missouri, Kansas and Texas Railway Company in the States of Missouri and Kansas, and in the Indian Territory, except the said two branch lines in the Indian Territory extending to the Osage and Atoka mines respectively.

Bonds were issued under the said mortgage and are now outstanding to an amount of the principal sums aggregating five hundred and forty-three thousand (\$543,000) dollars. The interest accruing on the said bonds was payable from the net or surplus earnings of the said company remaining after the payment of the expenses of operating and keeping in repair its railway and property, and of the interest on all the mortgages prior in point of time to the said mortgage of April 1, 1876; and that there are no net earnings applicable to the payment of any portion of the interest now outstanding on the said bonds.

## XXIX.

That the East Line and Red River Railroad Company, a corporation organized under the laws of Texas, and by its charter authorized to construct, own and maintain a railway from the city of Jefferson, in the county of Marion, State of Texas, to the town of Greenville, in the county of Hunt, State of Texas, and thence westwardly and northwestwardly to the western limits of the State of Texas, made, executed and delivered a mortgage or deed of trust dated June 1, 1880, to the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia, as trustee, and by the said mortgage it conveyed to the said trustee part of the railroads hereinbefore described commencing at McKinney, in Collin county, and extending thence in an easterly direction through the counties of Hunt, Hopkins, Franklin, Camp, Morris and Cass to Jefferson, in the county of Marion, a distance of one hundred and fifty-five miles.

Bonds were issued under the said mortgage and are now outstanding to the aggregate principal sum of one million eighty-one thousand (\$1,081,000) dollars. No interest has been paid on the said bonds since the 1st day of June, 1887. In conformity with the provisions contained in said mortgage a majority of the holders of the said bonds have elected to declare the principal thereof to be immediately due and payable; and that all of the said bonds together with the arrears of interest thereon are now due and payable.

On the 28th day of November, 1881, the said East Line and Red River Railway Company duly and lawfully granted and conveyed to the Missouri, Kansas and Texas Railway Company all of its said railroad, and all of its property, real and personal, and every right, title and interest in or to any franchise, and all rights of every name and kind to which the said East Line and Red River Railroad Company had any right, privilege or interest, except the franchise of the said East Line and Red River Railroad Company to be and remain a corporation. The said conveyance was made subject to the said mortgage to the Fidelity Insurance Trust and Safe Deposit Company of June 1, 1880, and the lien of the bonds issued under said mortgage is prior and superior to the lien of the mortgage of the Missouri, Kansas and Texas Railway Company dated December 1, 1880.

## XXX.

That a majority in interest of the holders of all the bonds issued under the said mortgage of December 1, 1880, and under the mortgage of December 1, 1886, have, in conformity with the terms of the said mortgages, elected that the principal sum of all the said bonds issued under and secured by the said mortgages shall become and be immediately due and payable.

The amount now due and payable for principal, to the holders of the six per cent bonds issued under the said mortgage of December 1, 1880, and the mortgages supplementary thereto, is \$17,924,000.

The following are the dates of maturity and amounts of the unpaid coupons belonging to the said six per cent. bonds:—June 1, 1888, \$587,720; December 1, 1888, \$587,720; June 1, 1889, \$587,720; December 1, 1889, \$587,720; aggregating in all \$2,150,880. And interest on the said bonds since the 1st



day of December, 1889, to the date of this decree, has also accrued and remains unpaid.

The amount now due and payable on the said five per cent. bonds, issued under the said mortgage of December 1, 1880, is \$9,381,000.

The following are the dates of maturity and amounts of the unpaid coupons belonging to the said five per cent. bonds:— June 1, 1888, \$234,525; December 1, 1888, \$284,525; June 1, 1889, \$284,525; December 1, 1889, \$284,525; aggregating in all \$988,100. And interest on the said bonds since the 1st day of December, 1889, to the date of this decree, has also accrued and remains unpaid.

#### XXXI.

It is therefore ordered, adjudged and decreed, and this court doth hereby order, adjudge and decree, that the defendant, the Missouri, Kansas and Texas Railway Company, is insolvent and that the said defendant shall, on or before the expiration of thirty days from the date of this decree, pay into this court, or into the hands of the depository to be named by this court, to the credit of this suit, the following sums, for the use and benefit of all the holders of the said six per cent and five per cent bonds issued under the said mortgage of December 1, 1880, and the mortgages supplementary thereto, and for the use and benefit of all the holders of the said unpaid coupons, and also a sufficient sum of money in addition to defray the costs of this action:—

For the use and benefit of the holders of the bonds and unpaid coupons secured by the said mortgage of December 1, 1880, and the said supplementary mortgages, the sum of \$30,893,980, together with the amount of interest accrued or to accrue on the said bonds from the 1st day of December, 1889, to the time of such payment.

#### XXXII.

It is further ordered, adjudged and decreed that, in default of such payment at or before said thirty days, the said defendant, the Missouri, Kansas and Texas Railway Company, and all persons or parties claiming under it since the execution of the said mortgage of December 1, 1880, shall be barred and foreclosed of all equity of redemption of, in and to the said mortgaged premises, property, rights, assets and franchises described or embraced in the said mortgage of December 1, 1880, or in the mortgages supplementary thereto, or any of them, and every part and parcel thereof.

#### XXXIII.

It is further ordered, adjudged and decreed that, in default of such payment within the said thirty days, all the said mortgaged premises and property, real, personal or mixed, rights, privileges, immunities and franchises, shall be sold, upon the terms and in the manner following:—

(1) — — is appointed master commissioner to direct and conduct the said sale.

(2) The said master commissioner shall give public notice of the time,

place and terms of such sale, by advertisement, published not less than five times a week for eight consecutive weeks, in one or more newspapers published in the cities of Topeka, St. Louis and New York, and in such other newspapers as to the said master commissioner may seem proper.

(3) The said sale shall be at public auction, in the city of Topeka, in the State of Kansas, at the time and place designated in such public advertisement.

(4) The said master commissioner may adjourn the said sale from day to day, or week to week, or otherwise, giving such notice as to him shall seem reasonable of such adjournment, and may make the sale at the time and place to which the same may be adjourned.

(5) On the consummation of the sale, upon the terms and conditions thereof, the said master commissioner shall make and deliver to the purchaser or purchasers thereof good and sufficient deeds in law, conveying all the property, real, personal or mixed, so sold by him.

(6) The said master commissioner shall offer for sale, as one parcel, all the property, real, personal or mixed, and premises, rights, privileges, immunities and franchises, of every kind and description, covered by the said mortgage of December 1, 1890, and the said mortgages supplementary thereto, subject, however, to the liens of the following mortgages:—

A mortgage made by the Union Pacific Railway Company, Southern Branch, dated November 14, 1868, to Russell Sage and N. A. Cowdrey, trustees.

A mortgage made by the Tebo and Neosho Railway Company to the Union Trust Company of New York, trustee, dated June 1, 1870.

A mortgage made by the Hannibal and Central Missouri Railroad Company to the Farmers' Loan and Trust Company of New York, trustee, dated April 26, 1870.

A mortgage made by the Hannibal and Missouri Central Railroad Company to the New York Guarantee and Indemnity Company of the city of New York, trustee, dated February 1, 1872.

A mortgage made by the Missouri, Kansas and Texas Railway Company to the Union Trust Company of New York, trustee, dated February 1, 1871.

An additional mortgage made by the Missouri, Kansas and Texas Railway Company to the Union Trust Company of New York, trustee, dated June 1, 1872.

An additional mortgage made by the Missouri, Kansas and Texas Railway Company to the Union Trust Company of New York, trustee, dated November 1, 1872.

An additional mortgage made by the Missouri, Kansas and Texas Railway Company to the Union Trust Company of New York, trustee, dated the 1st of June, 1872.

A mortgage made by the Missouri, Kansas and Texas Railway Company to the Union Trust Company of New York, trustee, dated April 1, 1876.

A mortgage made by the East Line and Red River Railroad Company to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, trustee, dated June 1, 1880.

A mortgage made by the Gainesville, Henrietta and Western Railway Company to John F. Dillon and Henry B. Henson, trustees, dated December 1, 1886.

A mortgage made by the Dallas and Greenville Railway Company to John F. Dillon and Henry B. Henson, trustees, dated the 1st day of December, 1886.

A mortgage made by the Trinity and Sabine Railway Company to the Mercantile Trust Company, trustee, dated the 15th day of December, 1881.

A mortgage made by the Taylor, Bastrop and Houston Railway Company to John F. Dillon and Henry B. Henson, trustees, dated the 1st day of December, 1886, and

A supplemental mortgage made by the said Taylor, Bastrop and Houston Railway Company to John F. Dillon and Henry B. Henson, trustees, dated the — day of —, 1887.

(7) The said master commissioner shall, however, accept no bid for the property above directed to be sold unless the said bid shall be at least the sum of \$—. In case such sum is not bid, the master commissioner shall forthwith adjourn the sale and apply to the court for instruction.

(8) The master commissioner may require, before accepting any bid, that the person making the same shall deposit with him — per cent. of the amount of such bid; and in case the said property and premises are sold, the purchaser thereof shall forthwith deposit with the said master commissioner a sum amounting to — per cent. of the amount of his said purchase, to be deposited in the registry of this court, to the order of the cause.

(9) The said master commissioner may fix a time and place for the final consummation of the said sale, at a period not later than three months after the date thereof, which time may, however, be adjourned by consent of all the parties or by the order of this court.

At the time fixed by the master commissioner for the consummation of the sale, and after the same shall have been confirmed by the court, the purchaser or purchasers of said property shall deposit the amount of his or their respective bids in the Mercantile Trust Company in the city of New York, to the credit of the master commissioner appointed to sell said property, whereupon the said purchaser or purchasers shall be entitled to receive possession of the property so purchased by him of them, for the receivers herein, who shall thereupon make a delivery of the same.

As soon as he is notified of such deposit of the purchase-price aforesaid, the master commissioner shall publish for ten days, in some paper published in the city of New York, a notice fixing a time when he will be ready to pay, in whole or in part, the bonds and coupons entitled to be paid out of the proceeds of said sale.

The Mercantile Trust Company of New York shall pay such bonds and coupons, or the *pro rata* due thereon, on the surrender and delivery to it of the said bonds and coupons, accompanied by the master commissioner's order and certificate that they are to be paid. Bonds and coupons paid in full shall be canceled by said master commissioner. Those that are only partially paid shall be so stamped and returned to the owners thereof.

(10) In case the purchaser or purchasers shall fail to comply with the terms of the bid or with any orders of the court relating to the consummation of the purchase or to any payment or part payment to be made on account thereof, then the sums paid in by such purchaser or purchasers shall be forfeited as a penalty for such non-compliance. If any sale for which a

deposit is made be not confirmed by the court, such deposit shall be returned to the bidder.

(11) Bonds secured by the said mortgage of December 1, 1880, and the mortgages supplementary thereto, and overdue coupons belonging thereto, may be received by the said master commissioner on account of amounts to be paid on the purchase of the said mortgaged premises, at such price or value as would be equivalent to the distributive amount that the holders of the said bonds would be entitled to receive in case the entire amount of the bid were paid in cash.

(12) If any purchaser or purchasers shall fail to comply with the terms of his or their bid, or complete the said purchase, the said master commissioner may, with or without further application to this court, again advertise the mortgaged premises for sale, and sell the same on the same terms and conditions and subject to the same prior liens as are hereinbefore stated.

#### XXXIV.

It is further ordered, adjudged and decreed that the entire fund to arise from the sale of the said premises shall be applied as follows:—

(1) To the payment of the costs of this cause, and of all proper expenses attendant upon said sale or sales, including the compensation of the master commissioner appointed to make the same, and to the payment of all charges, compensations, allowances and disbursements of the complainant, the Mercantile Trust Company, trustee, and of its attorneys, solicitors and counsel; and of the receivers and of their counsel and solicitors respectively; and also such other proper allowances, compensation and disbursements to parties or to their counsel as may be directed to be paid by the order of this court.

All of the payments to be made under this subdivision shall be hereafter fixed and allowed by this court or a judge thereof.

(2) The remainder of the said fund shall be applied to the payment of all the said six per cent. and five per cent. bonds, and of the said unpaid coupons appertaining thereto, and of the interest accruing and to accrue on the said bonds since December 1, 1880, without priority or preference as between principal, coupons and interest, in full, or ratably if the said fund shall not be sufficient to pay the said bonds, coupons and interest in full.

The balance, if any, shall be paid into court to the credit of this cause, subject to the further directions of this court.

In case said fund is insufficient to pay said bonds, coupons and interest in full, said deficiency shall be reported by said Mercantile Trust Company to said master commissioner, and by said master commissioner to this court, and thereupon the complainant shall recover from the Missouri, Kansas and Texas Railway Company the amount of such deficiency. In case of such deficiency said Mercantile Trust Company shall stamp upon said bonds or coupons so paid the amount of such payment, and shall return said bonds or coupons to the owners thereof with the payment so stamped upon the same. All bonds and coupons which may be paid in full shall be received by the said Mercantile Trust Company and canceled, and the said Mercantile Trust Company shall then deliver the same so canceled to the Missouri, Kansas and Texas Railway Company.

## XXXV.

It is further ordered, adjudged and decreed that when delivery is made by the receivers of the property herein ordered to be sold, to the purchaser or purchasers, they shall file their accounts before the special master commissioner, showing the surplus of revenues then in their hands and all their outstanding liabilities, liquidated and unliquidated, and the court reserves all questions as to the distribution of said surplus and as to the protection of the receivers from the demands and claims against them pertaining to the business of said receivers.

## XXXVI.

It is further ordered, adjudged and decreed that the purchaser or purchasers of the property herein and hereby ordered to be sold shall, after the delivery of the same to them, hold, possess and enjoy the said mortgaged premises and property, and all the rights, privileges, immunities and franchises appertaining thereto, as fully and completely as the said Missouri, Kansas and Texas Railway Company, the defendant herein, now holds or enjoys, or at the time of the making of the mortgage of December, 1, 1880, or at the respective times of the making of the mortgages supplementary thereto, held or enjoyed, or is or was entitled to hold or enjoy the same, subject nevertheless to the payment of any amount which this court may find and determine to be due and payable by reason of intervening petitions heretofore filed in this cause and which this court shall determine to be entitled to priority over the said mortgage of December 1, 1880, and the said supplementary mortgages.

## XXXVII.

It is further ordered, adjudged and decreed that the Missouri, Kansas and Texas Railway Company and the Mercantile Trust Company, the trustees of the said mortgage, shall, as a further assurance to the purchaser or purchasers, join with the master commissioner in the execution of the deed or deeds to be made by him, to such purchaser or purchasers, of the properties above ordered to be sold, and shall thereby convey and release all such properties, and all their rights, titles and interests in the same respectively, and in any part or portion thereof.

## XXXVIII.

And it is further ordered, adjudged and decreed that any party to this cause, and also any intervening petitioner who has duly filed his petition herein, and also the receivers, may at any time apply to this court for further relief, at the foot of this decree, as well as for such modifications thereof, in respect to the terms or conditions of the said sale, or to the distribution of the proceeds thereof, or in respect to any matter which may affect the rights of any of the parties to this cause, as may be just and proper.

*Advertisement of Railway Foreclosure Sale.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MASTER'S SALE UNDER DECREE OF FORECLOSURE IN THE MATTER OF THE KANSAS CITY, WYANDOTTE AND NORTHWESTERN RAILROAD COMPANY.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant, No. 6472.      vs.	} IN EQUITY.
THE KANSAS CITY, WYANDOTTE AND NORTHWESTERN RAILROAD COM- PANY <i>et al.</i> , Defendants.	

Whereas, at a term of the circuit court of the United States for the district of Kansas, held at the city of Leavenworth, in the State of Kansas, on the 18th day of June, 1891, a decree was entered in the above-entitled suit foreclosing the mortgage of said defendant, the Kansas City, Wyandotte and Northwestern Railroad Company, mentioned and described in said complainant's bill of complaint; and

Whereas, it is therein ordered, adjudged and decreed that all the corporate property now owned or hereafter to be acquired by the said Kansas City, Wyandotte and Northwestern Railroad Company in the State of Kansas and other States, and all its estates, right, title, interest and equity of redemption therein; that is to say, all of its railroad now constructed and in operation and yet to be constructed, including extensions, branches, spurs and side-tracks, and including right of way, road-bed, superstructures, iron, steel, rails, ties, splices, chains, bolts, nuts and spikes, all land and depot grounds, station-houses and depots, viaducts, water-tanks, bridges, timber materials and property purchased or to be purchased or owned by it, for the construction, equipment or operation of said road, all machine-shops, tools, implements and personal property used therein or upon or along said railroad, or at its stations; all engines, tenders, cars and machinery, and all kinds of rolling stock, whether now owned or hereafter purchased by said railroad company, and all other property of said company now owned or hereafter to be acquired, and all its rights and privileges therein or appertaining thereto, and all revenues, tolls and income of said railroad and property, and all franchises and rights of said railroad company, and all property and rights acquired and hereafter to be acquired by virtue and under authority thereof; excepting, however, such lands now owned or hereafter acquired by said railroad company as are not or may not be necessary or used for right of way, depot grounds of said railroad, or in operating the same, be sold under the direction of Hiram P. Dillon, the undersigned master commissioner, and the proceeds of such sale applied to the satisfaction of said judgment, interests and costs, except such as is otherwise provided for in said decree; and

Whereas, it is further ordered, adjudged and decreed that said master commissioner shall sell said property for cash, or for cash and bonds, and as an entirety, and without appraisalment and without the benefit of any stay,

valuation or redemption laws, at public auction, to the highest bidder therefor, at the city of Kansas City, in the State of Kansas; and

Whereas, it is further ordered, adjudged and decreed that notice of the time and place of said sale shall be given by said master commissioner by advertising the same at least three times in each week for the term of five weeks preceding the day of sale, in some newspaper published in the city of Boston, in some newspaper published in the city of New York, and in some newspaper published in the city of Topeka, State of Kansas, and also once a week for four weeks in some newspaper published in Wyandotte county, Kansas; and that such sale shall be had at such time and place as said master commissioner shall in said notices of said sale appoint; and

Whereas, it is further ordered, adjudged and decreed that said master commissioner shall receive no bid at such sale for a less sum than one million dollars (\$1,000,000), and no bid from any person who shall not first deposit with him as a pledge that such bidder will make good the bid in case of its acceptance, the sum of seventy-five thousand dollars (\$75,000) in money or said bonds secured by said mortgage to the complainant to the amount of two hundred thousand dollars (\$200,000), exclusive of interest; the deposit so received from the successful bidder shall be applied on account of the purchase price; the balance of the purchase price may be paid either in cash, or the purchaser may satisfy the same in whole or in part by paying over and surrendering any of the outstanding and unpaid receiver's certificates and by properly releasing and discharging any claims which have heretofore, or may be hereafter, adjudged by this court to be valid and prior in right to the lien of said mortgage, and by presenting and surrendering said first-mortgage bonds and the overdue and unpaid coupons pertaining thereto. For more particularity, both as to the property to be sold and the terms of the sale, reference is made to the decree of foreclosure entered in the above suit.

Now, therefore, public notice is hereby given that I, Hiram P. Dillon, master commissioner, in pursuance of the provisions of said decree, will, on Monday, the 12th day of June, A. D. 1898, between the hours of 11 o'clock A. M. and 2 o'clock P. M. of said day, in the city of Kansas City, in the State of Kansas, at the front door of the court-house in said city, sell at public auction to the highest bidder, in accordance with the terms and conditions of said decree, the above-described property, lands and premises, and apply the proceeds thereof as is by said decree made and provided.

HIRAM P. DILLON,

Master Commissioner, United States Circuit Court, District of Kansas.  
TURNER, MCCLURE & ROLSTON and ROSSINGTON, SMITH & DALLAS, Solicitors for Complainant.

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### *Railway Reorganization Agreement.*

Whereas, certain bondholders and stockholders of the Missouri, Kansas and Texas Railway Company have designated Frederic P. Olcott, Joel F. Freeman, Henry W. Poor, Henry Budge, Colgate Hoyt, Louis Fitzgerald and H. J. De Marez Oyens to be a committee for the purpose of reorganizing

ing the Missouri, Kansas and Texas Railway Company, and for the further purpose of taking such proceedings as may by them be deemed necessary for the protection and advantage of the bonds and stock assenting to this agreement; and

Whereas, the said bondholders and stockholders, when depositing their bonds and stock with the depositary named by said committee, have agreed that the said bonds and stock may be held by the said committee for and applied to the purposes stated herein; and the stockholders depositing their stock have also agreed to pay an assessment of \$10 on each share of the stock so deposited:

Now, therefore, the bondholders and stockholders so depositing their stock and bonds agree, each with the other but not the one for the other, and with the said committee, as follows:—

The said committee shall have the following powers and authority and is hereby constituted the agent and attorney irrevocable of each of the said parties for the purposes herein stated:—

*First.*—The committee shall invite by publication the holders of the five and six per cent. general consolidated bonds of this company issued under the mortgage of December 1, 1880, the holders of the income bonds issued under the mortgage of April 1, 1876, and the holders of the stock of this company, to assent to and become parties to this agreement by depositing their securities and receiving in exchange therefor the negotiable certificates of the Central Trust Company of the city of New York, the depositary of the said committee. The 15th of January, 1890, is hereby fixed as the last day on which such deposits can be made. Holders of any of the said bonds or stock who shall not have deposited the same on or before the 15th of January, 1890, shall not be entitled to any of the benefits of or to participate in or become parties to this agreement.

The said committee may, however, in its discretion, extend the said time for the deposit of such bonds and stocks for such time or times as it may deem proper, or may by resolution do so in particular instances on such terms and conditions as it shall see fit.

*Second.*—This agreement shall become effective when sixty-five (65) per cent. of all the bonds outstanding under the consolidated mortgage of December 1, 1880 (being the bonds known as "fives" and "sixes"), and when sixty-five (65) per cent. of the outstanding stock of the company shall have been deposited with the said depositary.

*Third.*—As soon as this agreement shall have become effective the committee shall have full power to take all such steps as shall expedite the suits for foreclosure of the respective mortgages of this company, and to bring about at an early date a sale or sales of all property of the company under decrees of the court or courts having jurisdiction of such suits; and the said committee shall have power to purchase said property for account of such reorganization and of the parties assenting thereto; and shall also have power to form such new corporation or corporations as may be necessary to carry out this plan.

*Fourth.*—Such new corporation is to acquire and succeed to all the property, rights and franchises of the said Missouri, Kansas and Texas Railway



Company, or of any of the incorporations through which it holds property or exercises or enjoys rights and franchises, and is to acquire and possess such other rights, property and franchises as shall by said committee be deemed advisable to carry out the general scope, purpose and objects of this agreement.

The board of directors of said corporation or corporations shall be named by the said committee, and the persons designated as directors shall hold office for two years from the time of the incorporation of the new companies, and all vacancies in the said board or boards shall be filled by the remaining members thereof.

Provided, however, that if any of the provisions of this fourth clause cannot be carried into effect the committee shall have full power to take such proceedings, or assent thereto, as shall accomplish the objects of this clause as nearly as may be practicable.

*Fifth.*—The said corporation or corporations shall issue the following securities:—

Four per cent. 100-year gold bonds secured by first mortgage on all the property of the new company, interest commencing June 1, 1890. ....	\$40,000,000
Four per cent. second-mortgage gold bonds secured by the same property. ....	20,000,000
Four per cent. preferred stock. ....	18,000,000
Common stock. ....	47,000,000

The interest on the before-mentioned \$20,000,000 second-mortgage gold bonds shall, during the period of five years from the date thereof, be paid only if earned. Net earnings if applicable to payment on the said second-mortgage bonds are the earnings which shall remain after deducting from the gross earnings, operating expenses, taxes and interest on the first-mortgage four per cent. bonds, repairs, renewals, replacements and insurance. In case, however, such net earnings at the end of any fiscal year shall be sufficient to pay the interest on said second-mortgage bonds in part, interest on said second-mortgage bonds at a rate less than four per cent. per annum may be paid thereon, the amount so paid to be in full satisfaction of interest for the year to which such earnings are applicable. The right to interest during said five years is to be non-cumulative. After the expiration of the said five years, the obligation to pay interest on the said bonds is to become absolute; and the mortgage securing the same shall contain proper covenants for a foreclosure of the said mortgage after the said five years, in the event of a default in the payment of interest on the same, after the obligation to pay such interest shall have become absolute.

*Sixth.*—The securities issued under the fifth clause of this agreement shall be applied as follows:—

Twenty-two million five hundred thousand of the said new four per cent. first-mortgage bonds and \$5,400,000 of the said preferred stock shall be applied by the said committee to the requirements of the subscriptions for the cash fund of \$18,000,000 provided for in the eighth clause of this agreement.

Each holder of a certificate of the Central Trust Company representing

the deposit of a \$1,000 six per cent. general consolidated bond shall be entitled to receive for the same

New four per cent. first-mortgage gold bonds.....	\$640
New second-mortgage gold bonds.....	550
Preferred stock .....	275

Each holder of a certificate of the Central Trust Company representing the deposit of a \$1,000 five per cent. general consolidated bond shall be entitled to receive for the same

New four per cent. first-mortgage gold bonds.....	\$550
New second-mortgage gold bonds.....	500
Preferred stock .....	200

Each holder of a Central Trust Company certificate for a \$1,000 income bond issued under the mortgage of April 1, 1876, shall be entitled to receive for the same

New four per cent. first-mortgage gold bonds.....	\$550
New second-mortgage gold bonds.....	500

The initial interest day on all of the said bonds shall be the 1st of June, 1890, and the securities above offered shall be in full satisfaction for all claims for par and interest on the said fives, sixes and incomes, and shall fully satisfy and discharge the said bonds.

Each holder of a certificate of the Central Trust Company representing the deposit of stock of the Missouri, Kansas and Texas Railway Company, the assessment on which has been fully paid and noted thereon, shall be entitled to receive for such certificate new common stock, dollar for dollar, and new second-mortgage gold bonds for the amount of said assessment.

*Seventh.*—An assessment of \$10 on each share of the existing stock of the company shall be paid to the Central Trust Company as such depository, for the credit of the committee, to be used by the said committee for the purposes of said reorganization; \$2.50 on each share shall be paid at the time the stock is deposited, and the remaining \$7.50 of the assessment shall be paid in three payments of \$2.50 each, on call of the committee by advertisement in two newspapers in the city of New York for twenty days successively. If a holder of a certificate on which the assessment has been paid in part shall neglect for ten days after the day fixed by such advertisement to pay the instalment, he shall lose his right to second-mortgage bonds or new stock, and the committee may make such disposition of the same as it thinks proper. The committee may, however, in its discretion by resolution waive any such forfeiture and accept payments of overdue instalments of assessments on such terms as it shall deem fit.

*Eighth.*—Holders of the five and six per cent. general consolidated bonds of the company and of its stock may subscribe to a cash fund of \$18,000,000, which is to be applied to the payment of the principal of the first-mortgage seven per cent. bonds and of the underlying bonds on the following terms:—

Each holder of a \$1,000 five or six per cent. bond shall be entitled to subscribe for \$400 of the said fund. For each \$400 of such cash subscription, the subscriber is to receive \$500 of the said new four per cent. first-mortgage bonds and \$120 of the said four per cent. preferred stock. Each holder

of one hundred shares of the stock of the company may subscribe for \$1,600 of the proposed fund, for which cash subscription he is to receive \$2,000 of the said new four per cent. first-mortgage bonds and \$480 of the said preferred stock. All subscriptions must be made on or before the 15th day of January, 1890; and at the time of making such subscription, the holder of the bonds or stock on which the subscription is made must deposit the same with the Central Trust Company and become a party to the agreement of reorganization. The names of all subscribers shall be registered by the Central Trust Company, and the right to the subscription shall belong to the registered subscriber and shall not follow a sale of the certificates representing the bonds or stock. If, on the 15th day of January, 1890, any portion of the said \$18,000,000 fund shall remain unsubscribed, the committee charged with the execution of this plan will offer to the registered subscribers the right to subscribe to the unsubscribed balance of the said fund, upon such terms and conditions as the committee may fix.

The right to make such additional subscription is limited to the period of fifteen days from the said 15th day of January, 1890.

The allotment of subscriptions shall be made by the committee at the expiration of the period last referred to. The committee charged with the execution of the plan reserves to itself the right to allot an amount less than the amount of the subscription.

At the time such allotment is made each subscriber will be required to pay to the Central Trust Company, in cash, five per cent. of the amount so allotted, for the credit of the committee. In the event of a failure to make such payment for a period of ten days after the said allotment, the said subscription may be canceled, at the option of the committee. The remaining ninety-five per cent. of the said allotment shall be payable at the call of the committee and against the negotiable certificates of the said Central Trust Company, which shall entitle the holder thereof to the new four per cent. first-mortgage bonds and to the preferred stock appertaining to the said subscription when the same shall be issued in accordance with this agreement.

All payments for subscriptions to the said \$18,000,000 fund and payments for the assessment of ten dollars on each share of the stock of the company shall be made in cash or in the seven per cent. first-mortgage consolidated bonds of the company. The said seven per cent. bonds may be forthwith deposited with the Central Trust Company to be applied to the payment of any amount due on any subscription to the \$18,000,000 cash fund to which the depositor may be or may become entitled, or to the payment of any assessment for which he may be or may become liable on stock deposited. The bonds so applied are to be taken at par and interest accrued and to accrue at seven per cent. to the date of their payment under this agreement. When so paid any excess above such application shall be paid to the depositor of such bonds.

If this agreement should not become effective by reason of a failure to receive the required sixty-five per cent. deposit of bonds and stock herein referred to, or if the said railroad should not be purchased by the said committee, and the securities above described should not be issued, the said five per cent. cash payment, made on the allotment of the said subscriptions,

and other payments on said subscriptions, if any have been made, and any seven per cent. bonds which have been applied or may be applicable to the payment of said subscription, shall be refunded or returned to the subscribers without charge or expense.

*Ninth.*—The said cash fund of \$18,000,000, and as much of the proceeds of the assessment of \$10 on the stock of the company as may be required, shall be applied by the said committee to the following purposes:—

1. To the payment of the amount due for principal and interest on the seven per cent. first consolidated bonds and for the expenses of the suit instituted for the foreclosure of the same, or to the payment of the amount directed to be paid by the decree in the said foreclosure suit; and the said committee may obtain suitable provisions in the said decree of foreclosure, securing the proper application of the said fund through the master who shall be charged with the execution of the said decree, so that the said fund may be used as part of the bid to be made by the said committee for the purchase of the said railroad and applied by the said master to the satisfaction of the said decree.

2. The said committee may apply so much of the said subscribed fund and of the said assessment as it may deem proper to retiring or adjusting the underlying bonds referred to in the mortgage of the Missouri, Kansas and Texas Railway Company of February 1, 1871, being the bonds of the Union Pacific, Southern Branch; the Tebo and Neosho; the Hannibal and Central Missouri Railway, first mortgage; and the Hannibal and Central Missouri Railway, second mortgage; and also to adjusting or retiring the outstanding bonds of the East Line and Red River Railway. The said committee are fully authorized as to all of the said underlying bonds of the said railways to make such adjustments as they may deem proper for retiring such underlying bonds, and may agree to pay such sum in money or other available security as they deem proper for such purpose. The said committee may also in its discretion exclude any of the said underlying bonds from the said proposed reorganization, if it shall be unable to effect satisfactory arrangements with the holders thereof. In the event of the said underlying bonds refusing to accept the principal of their bonds and the interest accrued thereon by reason of the same not being yet due, the said committee may decrease the cash fund of \$18,000,000 by a proportionate decrease in the allotments to subscribers; or, if the time of the maturity of the said bonds shall be so near at hand as to enable the committee to make provision for the payment thereof without substantial loss, it shall deposit the moneys applicable to the said bonds in such trust companies as may be selected by the committee, and apply the said fund to the payment of the bonds at maturity, or it may deposit the proportionate amount of the new first-mortgage gold bonds to cover the amount of the said outstanding underlying bonds.

*Tenth.*—The committee may make such adjustment as it deems proper with the holders of scrip certificates and coupons appertaining to the income bonds issued under the mortgage of April 1, 1876, and may also make such provision as may be necessary for such outstanding obligations of the company as may be required or directed by the decrees in the respective foreclosure suits now pending.

*Eleventh.*— All depositors of stock under this agreement will be registered by the Central Trust Company, and after the expiration of the time allowed for such deposit, the first privilege to exercise the rights of the holders of such undeposited stock, and, on payment of the assessment thereon, to receive second-mortgage bonds and the new stock which would have been applicable to such undeposited stock, had the same been deposited under this agreement, shall be offered to such registered depositors of stock on such terms and conditions and for such period as the committee may hereafter prescribe; and the holders of the certificates of the Central Trust Company for the payment of the assessment under this clause of the agreement shall be entitled to all the rights, privileges and benefits which would have appertained to the non-assenting stockholder had he elected to deposit his stock and become a party to this agreement.

*Twelfth.*— A syndicate or syndicates may be formed to carry out or make effective this plan and to secure and guaranty the same.

*Thirteenth.*— As to all undeposited stock or stocks which shall not have been taken up under the privilege extended to registered depositors as provided in the eleventh clause of this agreement, the committee may hold the second-mortgage bonds and the new stock applicable to such undeposited stock and may use the securities so held by them for the purpose of borrowing money thereon, or may sell the same at public or private sale, and on such terms as they think desirable, and apply the proceeds of such loans or sales to the same purposes to which the assessment on such undeposited stock would have been applied, or to such purposes as may best promote this plan of reorganization.

The same conditions shall apply to stock upon which the payment of any instalment of assessment shall be in default.

*Fourteenth.*— As to all of the five and six per cent. general consolidated bonds which shall not be deposited under this agreement, and shall not assent to the proposed reorganization, the said committee shall hold all the securities which would have been applied in the exchange of such outstanding non-assenting bonds, and may pledge all such securities or sell the same at public or private sale, and on such terms as they think desirable, and apply the proceeds of such pledge or sale to the adjustment of the claim of such non-assenting bonds, or to such other purpose as may best serve the interests of such reorganization; and the said committee may obtain such provisions as may be proper in the decrees to be entered in the said foreclosure suits, to enable the funds so raised to be applied through the intervention of the master to whom the execution of such decree shall be confided, to the payment of any amount which such non-assenting bondholders may be entitled to receive under the terms and provisions of the said decree.

*Fifteenth.*— The said committee may by its own action fill any vacancies and may increase its number; it may act by a majority of its members either at a regular or a special meeting called on notice, or it may act by writing signed by a majority of its members, without formal meeting of the committee. The said committee shall keep a full record of its proceedings, and shall keep accounts of all stock, bonds, property and money which shall pass through its hands; and all balances of bonds, stock, property or

money which at the close of its work may remain in its hands undisposed of will be turned over or paid to the reorganized corporation, or to the persons or person properly entitled thereto.

No member of the committee shall be liable for the misconduct, omission or fault of any other member, and it is expressly understood that the committee assumes no responsibility for the execution of the above plan or any part thereof; its members, however, will in good faith endeavor to execute the same. The committee may delegate any necessary authority or discretion to any special committee. But they shall not be personally liable for the acts of such special committee or agents or employees.

The committee shall be entitled to charge all its necessary disbursements heretofore or hereafter made for counsel fees, clerk hire, advertising, printing, and for such other expenses as may be necessary and proper in the discharge of its functions, and its members shall be entitled to reasonable compensation for their services. They may be or become pecuniarily interested in any of the securities hereinbefore mentioned. The accounts of the committee shall be filed with the board of directors of the new corporation, and the said committee shall then be discharged. Said accounts so filed shall be final upon all parties.

*Sixteenth.*—The Central Trust Company of New York is designated to be the depository for all stocks, bonds and property which may be at any time in the hands of the said committee, and it may agree with such depository on a proper form of certificate of deposit of bonds, stocks, or other property, to be issued either in the name of such depository or in the name of the committee, which said certificates shall be issued and delivered to all parties delivering such bonds, stock, property, or making such payments on any assessment or assessments called by the committee.

The deposit of securities and the receipt of certificates of deposit shall have the same effect as if the holders of such certificates had signed this agreement.

*Seventeenth.*—In every case in which the said committee, in pursuance of any of the provisions of these presents, may find it necessary or expedient, for the purpose of purchasing the property and franchises of the said railway company, and for the purpose of paying in cash a proportion of any bid which may be required by the decree or by the orders of the court to be paid, in all such cases the committee shall be and is hereby authorized to raise and provide the funds required for the purposes aforesaid by means of temporary loans for such times and at such rates of interest as the committee shall find to be necessary; and, for the purpose of securing the payment of such loans to be raised for the purposes aforesaid, or any of them, the said committee is authorized and empowered to pledge as security for the moneys so borrowed all or any part of the securities, bonds, stock or property which may have been deposited with or transferred to it. But this seventeenth clause shall not apply to seven per cent. first-mortgage bonds, except as to such of them as shall have been applied to the payment of stock assessments or subscriptions to the \$18,000,000 cash fund.

*Eighteenth.*—If the said committee shall fail to secure the deposit of a sufficient amount of the said bonds and of the said stock to render the said reorganization practicable, and shall determine to abandon the same, it

shall thereupon surrender all deposited bonds to the holders of the certificates of its depository therefor, on the surrender of such certificates.

In the same event the necessary and proper expenses of the committee shall be charged to the depositing stockholders and to the assessment which may have been paid in, and the surplus shall be apportioned among the holders of the certificates for stock deposited, and the deposited stock be returned on the surrender of such certificates.

In witness whereof, the said parties have hereunto set their names or affixed their corporate seals, and have written opposite their names or seals the amount of their stock or of the bonds held by them, and the classes thereof.

Dated New York, November 27, 1889.

Name.	Address.	Class of Bonds.	Stock.	Amount.
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

### *Railway First Mortgage.*

This indenture, made the 1st day of May, in the year 1894, by and between the Southeastern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of South Carolina, party of the first part, hereinafter called "the Railway Company;" and the Boston Trust Company of Boston, hereinafter called "the Trustees," party of the second part, witnesseth:—

Whereas, the Railway Company, in order to meet the cost and expense of constructing, building, equipping and putting into operation its lines of railway within the State of South Carolina, from a point on the bank of Deep river, in the townships of H— and L—, adjacent to the corporate limits of the village of M—, in the county of R—, through the counties of R—, D—, A— and M— to the cities of N— and I—, in the said county of M—, a distance of ninety-five miles, more or less, has resolved to issue and negotiate a series of forty-year first-mortgage gold bonds of one thousand dollars each, the total issue whereof, secured by this mortgage, shall not exceed sixteen hundred thousand dollars, to be issued at the rate of twenty thousand dollars for each mile of completed road, all of which bear date the 1st day of May, 1894, and are made payable to bearer forty years after the 1st day of May, 1894, at its agency in the city of Boston, to wit, the Boston Trust Company of Boston, or any agency which may hereafter in said city be substituted in its place, with interest from the date of said bonds at the rate of five per centum per annum, payable semi-annually on the 1st day of November and May of each year, on the presentation and surrender of the proper annexed coupons, the principal and interest whereof are payable at such agency in Boston, and are to be paid in gold coin of the

present standard of weight and fineness, as fixed by the laws of the congress of the United States of America now in force, the said bonds being also exempt from any income tax that may be levied or provided for by any laws of the State of South Carolina or of the United States, and all of the said bonds and the interest to become due thereon being equally and alike secured by these presents, although issued at different times, upon being duly authenticated by a certificate to be signed by the said Trustee; and

Whereas, the stockholders of the Railway Company did, on the 29th day of April, 1894, by a vote of more than two-thirds of all the then outstanding stock of the said company, duly authorize and approve the issue of the bonds herein provided for and the making of this indenture and the conveyance and transfer of all the property herein described to the party hereto of the second part as security for the said bonds and for the interest to accrue due thereon, according to the terms and for the purposes of these presents declared; and

Whereas, due and timely notice of such meeting of the stockholders was given in the manner required by the laws of the State of South Carolina, and all the requirements of law before this mortgage shall take effect, having been duly and fully complied with; and

Whereas, this indenture has also been authorized by a resolution of the board of directors of the Railway Company, and the said board has also directed the bonds and certificate to be issued hereunder, substantially in the following form:—

UNITED STATES OF AMERICA,

STATE OF SOUTH CAROLINA.

THE SOUTHEASTERN RAILWAY COMPANY.

FORTY-YEAR FIRST-MORTGAGE FIVE PER CENT. GOLD BOND.

No. —.

\$1,000.

Forty years after the 1st day of May, in the year 1894, the Southeastern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of South Carolina, promises to pay to the bearer, for value received, at its financial agency in the city of Boston, one thousand dollars; and also promises to pay interest thereon at the rate of five per centum per annum, payable semi-annually on the 1st days of November and May in each year, on the presentation and surrender of the respective interest coupons hereto annexed, at the financial agency aforesaid. The principal and interest of this bond are to be paid in gold coin of the present standard of weight and fineness, as fixed by the laws of the United States now in force, without diminution on account of any income tax which hereafter may be levied or provided for under any laws of the State of South Carolina or of the United States.

This bond is one of a series of bonds of one thousand dollars each, numbered consecutively from one upwards, issued at the rate of twenty to each mile of completed road, the total issue whereof shall not exceed sixteen hundred thousand dollars, all of which are equally and alike secured by a deed of trust bearing date the 1st day of May, 1894, executed by the said



Railway Company to the Boston Trust Company of Boston, as trustee, conveying all and singular the entire line of the said company's railway within the State of South Carolina, built or to be built, beginning at a point on the bank of Deep river in the townships of H— and L—, adjacent to the corporate limits of the village of M—, in the county of R—, and extending thence in a northwesterly direction through the counties of R—, D—, A— and M—, to the cities of N— and I—, in the said county of M—, and all in the said State of South Carolina, a distance of ninety-five miles, more or less, together with all its other property, real and personal, and the rolling stock, equipment, material, rights of way, tracks, depots, shop or shop grounds, terminals, wharves, warehouses and docks, demands, hereditaments, appurtenances, rights, privileges and franchises, as in the said mortgage or deed of trust is fully declared.

And upon default in the payment of interest upon this bond for six months after such interest becomes due and payable and has been duly demanded, the Trustee may, subject to the conditions of the said mortgage, declare the principal of this bond and of all the outstanding bonds immediately due and payable, and shall and must do so if required, in writing, by the holders of one-third of all such bonds outstanding.

This bond shall pass by delivery or by transfer on the books of the said Railway Company, but, after the registration of the ownership of this bond certified hereon by the transfer agent of the said Railway Company, no subsequent transfer, except upon the transfer books of said company, shall be valid, unless the transfer shall be to bearer, and when made to bearer such transfer shall again render this bond transferable by delivery, and it shall so continue subject to successive registration and transfer to bearer, as aforesaid, at the option of each successive holder, provided the coupons issued herewith and not due are attached hereto when such registration is demanded.

This bond shall not become obligatory until the certificate indorsed hereon is signed by the said Trustee or its successor or successors in the trust.

In witness whereof, the said Southeastern Railway Company has caused this bond to be subscribed by its president and secretary, and its [SEAL] corporate seal affixed hereto on this 1st day of May, 1894, and the annexed coupons to be executed with the engraved signature of its treasurer.

THE SOUTHEASTERN RAILWAY COMPANY,

By — —, President.

Attest: — —, Secretary.

*Coupon No. 1.*

\$25.00.

\$25.00.

The Southeastern Railway Company will pay to the bearer, at its fiscal agency in the city of Boston, twenty-five dollars in gold coin, on the 1st day of May, 1894, being six months' interest on bond No. —.

— —, Treasurer.

*Trustee's Certificate.*

It is hereby certified that the Southeastern Railway Company has executed to the Boston Trust Company of Boston, trustee, a mortgage or deed

of trust, dated May 1, 1894, as described in this bond, to secure the same, and that this bond is one of the bonds issued thereunder.

BOSTON TRUST COMPANY OF BOSTON,

By — —, Vice-President.

*Indorsement.*

No. —.

THE SOUTHEASTERN RAILWAY COMPANY.

\$1,000 First-Mortgage Bond.

Interest Five Per Cent.

Principal Payable May 1, 1904, in United States Gold Coin.

Interest Payable November 1 and May 1 in the City of Boston.

Now, therefore, this indenture witnesseth:—That the Railway Company, for the better security of the payment of said bonds, as hereinbefore set forth, with the interest thereon, unto the person or persons, body or bodies politic or corporate, who may become the holder or holders of the said bonds or any of them, his, her, its or their executors, administrators, successors or assigns, and in consideration of the sum of one dollar by the Trustee paid to the Railway Company, at or before the signing, ensealing and delivery hereof, the receipt whereof is hereby acknowledged, has granted, bargained, sold, released, conveyed and confirmed, and by these presents does hereby grant, bargain, sell, release, convey and confirm unto the Trustee and to its successor or successors in this trust forever, all and singular its said railway within the State of South Carolina, built or to be built, beginning at a point on the bank of Deep river in the townships of H— and L—, adjacent to the corporate limits of the village of M—, in the county of R—, and extending thence in a northwesterly direction through the counties of R—, D—, A— and M— to the cities of N— and I—, in the county of M—, a distance of ninety-five miles, more or less, together with all side-tracks, turnouts, engines, rolling stock, equipment and materials, all rights of way and tracks, depots and depot grounds, terminals, wharves, warehouses and docks, tenements and hereditaments, rights and franchises, including therein the rights and franchise to operate the said railroad, and including and meaning to include all the property, real and personal, now acquired or which hereafter may be acquired by the Railway Company within the State of South Carolina, used for, or in any wise appertaining to, the operation of the said railroad.

To have and to hold all and singular the said property and line of railroad, with their appurtenances, rolling stock and equipment, present and future, and all other premises, properties, rights, interests, franchises, revenues, tolls, income, immunities, privileges and other things aforesaid to the Trustee, as aforesaid, and its successors, and their heirs and assigns forever; in trust, nevertheless, for the equal *pro rata* use, benefit and security of all persons and corporations who shall become or be the owners or lawful holders of any of the said bonds to the aggregate amount of sixteen hundred thousand dollars intended to be hereby secured as aforesaid, which shall be hereafter issued, or of any of the coupons appertaining thereto, without preference of any of the said bonds over the other, by reason of priority in

the time of the issue or negotiation thereof or otherwise, upon the following trusts, conditions, covenants and agreements, to wit:—

*First.*— Upon the payment of the principal and interest of all of the outstanding bonds hereby secured, the estate hereby granted to the Trustee shall be void, and the right to all the real and personal property hereby granted and conveyed shall revert to and revest in the Railway Company, its successors or assigns, without any acknowledgment of satisfaction, reconveyance, surrender, re-entry or other act.

*Second.*— In case the Railway Company, its successors or assigns, shall fail to pay the interest on any of the said bonds at the time when the same shall become due and payable, according to the tenor thereof, and shall continue in such default for the full period of six months after such payment has been duly demanded at its or their agency in the city of Boston, or shall fail in the performance of any of the covenants herein contained on its part to be kept and performed, and if such default shall continue for a period of six months, then and thereupon the principal of all the bonds hereby secured shall be and become immediately due and payable, whensoever thereafter, the default still continuing, the Trustee shall give written notice to the Railway Company, its successors or assigns, of its option to that effect; and the Trustee shall and must give such notice, if and when required in writing to do so by the holders of one-third of the said bonds then outstanding.

*Third.*— Upon such default the Trustee, or its successor or successors in the trust, may, in its or their discretion, and shall and must, upon the request in writing of the holders of one-half of the said bonds then outstanding, and upon receiving proper indemnity against the costs and expenses which may be incurred by acting in pursuance of such request, take actual possession of said railway and of all and singular the property, things and effects hereby conveyed, and personally or by attorney or agent manage and operate the same and receive all the tolls, rents, income and profits thereof, until such time as the said bonds and interest thereon are fully paid or satisfied, and shall apply the money so received by it, first, to the expenses of the trust hereby created, and to the management and operation of the said railway and its appurtenances and to the needful repairs thereof; second, to the payment of interest overdue upon the said bonds, and then to the payment of the principal of the said bonds.

*Fourth.*— The Trustee, or its successor or successors in the trust, upon becoming entitled to take possession of the railway and property as aforesaid, may in its or their discretion, and shall and must, upon the written request of the holders of one-half of the said bonds then outstanding, and upon receiving proper indemnity against the costs and expenses which may be incurred by acting in pursuance of such request, cause the said premises so mortgaged to be sold, either as a whole or in such parcels as shall seem necessary and proper, having due regard to the interest of all parties, to the highest bidder, at public auction, in the village of M—, South Carolina, after giving at least sixty days' notice of the time, place and terms of the sale and of the specific property to be sold, by printed notice published in one or more newspapers in the city of Charleston, South Carolina, and in one or more newspapers in the city of Boston, once in each week during the said term of sixty days. Upon receiving the purchase-money therefor

the Trustee, or its successors in the trust, shall execute to the purchaser or purchasers thereof a good and sufficient deed of conveyance in fee-simple, which sale and conveyance shall forever be a bar against the Railroad Company, its successors and assigns, and all persons claiming under it or them, of all right, estate, interest or claim in or to the premises, property, things, franchises, privileges and immunities so sold, or to any part thereof, whether the Trustee be in the possession thereof or not, and the receipt of the Trustee shall be a full and sufficient discharge to such purchaser, and no purchaser holding such receipt shall be liable for the proper application of the purchase-money, or be in any way bound to see that the same is applied to the uses of this trust, or be in any manner answerable for its loss or misapplication, or be bound to inquire into the authority for making such sale.

*Fifth.*—The Trustee shall, after deducting from the proceeds of such sale the costs and expenses thereof and of the execution of this trust and all payments for taxes, assessments and counsel fees and other reasonable compensation, apply so much of the proceeds as may be necessary to the payment of the principal and interest remaining unpaid upon the said bonds and coupons, without giving preference to either principal or interest, it being the intention of this indenture that so long as the railroad and its appurtenances shall be managed by the Trustee or by a receiver, as a going concern, the income shall be applied to the payment of interest in preference to principal, but that after the sale of the railroad and its appurtenances no such preference shall be made in the distribution of the proceeds.

*Sixth.*—The Trustee may, if it shall so elect, instead of pursuing the remedies hereinbefore provided, by taking actual possession of the property and selling the same, proceed by suit in equity for foreclosure of the mortgage and the appointment of a receiver and a sale under and pursuant to a decree of any court of competent jurisdiction.

*Seventh.*—Upon any sale of the said premises, whether by the Trustee, after entry as aforesaid, or under the decree of any court of competent jurisdiction, the holders of the bonds hereby secured or any of them, or the Trustee on behalf of all of the bondholders, shall have a right to purchase, upon equal terms with other persons, and it shall be the duty of the Trustee, if so required, in writing, a reasonable time before such sale, by the holders of a majority in value of the outstanding bonds secured hereby, and upon being offered at the same time adequate indemnity against all liability to be incurred thereby, to make such purchase on behalf of all of the bondholders at a reasonable price, whether part only or the whole of the property hereby conveyed is sold, at a price not exceeding the whole amount, principal and interest, due or accruing upon said bonds, together with the expenses of the proceedings and sale, and the bonds secured by this mortgage shall be receivable at such sale as cash for the amount of cash which would be payable on such bonds out of the proceeds of such sale.

*Eighth.*—In the case of the purchase of the said property or of any part thereof by the Trustee, the same shall be held for the benefit of all of the bondholders in proportion to their respective interest in the bonds, and the property thus purchased shall be conveyed to such persons or corporation as may be designated by a majority in value of the bondholders in such manner as shall conform to the requirements of the laws of the State of

South Carolina; provided that such conveyance shall be made on such terms as will, in the judgment of the Trustee, secure to each and every bondholder his just proportion and right in the property purchased as aforesaid.

*Ninth.*— Meetings of the bondholders for any of the purposes referred to in this mortgage may be called by the Trustee, or by the bondholders themselves, upon reasonable public notice, to be published in two newspapers in the city of Boston, and to be held at a time and place to be designated in such notice.

*Tenth.*— The Railway Company for itself, its successors and assigns, hereby agrees to waive, and doth hereby absolutely and irrevocably waive and relinquish, the benefit and advantage of any and all valuation, stay, appraisal, redemption or extension law or laws, now existing or which may hereafter be passed by any State or States, which but for this provision, agreement and waiver might be applicable to any sale made under the provisions of this instrument, or the order or decree of any court or courts; and the Railway Company for itself, its successors and assigns, agrees to waive, and doth hereby irrevocably waive, any and all rights of redemption which it might or could otherwise have, or be entitled to, under any present or future laws of any State or States, upon or after or in respect of any sale of the hereby mortgaged premises, properties, rights and franchises, or any part thereof; and the Railway Company hereby covenants that it, its successors and assigns, will not in any manner set up or seek to take the benefit or advantage of any such present or future valuation, stay, appraisal, extension or redemption law, to prevent or hinder or delay such absolute and irredeemable sale of said mortgaged premises, properties, rights and franchises, as hereinbefore authorized to be made, as might but for such law be directed or decreed by a court of competent jurisdiction.

*Eleventh.*— Until default shall be made in the payment of the interest, or of some part thereof, or in the payment of the principal of the said bonds, the Railway Company shall remain in the full possession of the said mortgaged property, and may dispose of the current net revenue and income of all of the said property and railways hereby conveyed, in such manner as it may deem best; and while the Railway Company shall be in the possession of the said mortgaged premises, and there shall be no existing default in the payment of principal or interest of any of the said bonds or in the performance of the stipulations, conditions and provisions on the part of the Railway Company in this mortgage contained, the Railway Company, its successors or assigns, may, from time to time, sell or otherwise dispose of, free and clear from the lien or operation of this mortgage, any rolling stock, equipment or other personal property intended for use upon the said line of railway which shall have become worn out or otherwise unsuitable for use, or whenever it shall be intended to replace the same by other rolling stock, equipment or personal property; provided, however, that such sale or disposition shall not impair or reduce the efficiency of the rolling stock, equipment or other personal property required for the proper working of the road, and all rolling stock, equipment or other personal property which shall from time to time be acquired for use on the said railway or its extension or appurtenances by the Railway Company, its successors or assigns, with the proceeds of any sale or disposition as aforesaid or otherwise shall be

subject to the lien of these presents. While the Railway Company shall be in possession of the mortgaged premises, and there shall be no existing default as aforesaid, the Trustee, or its successor or successors in the trust hereby created, shall have full power and authority, in its or their discretion, upon the application in writing of the Railway Company, to release from the lien and operation of this mortgage any part of the mortgaged property; provided, however, that under this authority no portion of the main track of said railway nor any part of the principal depots or terminal facilities or other property which, in the judgment of the Trustee, is or may be essential to the due operation of the said railway shall be so released unless replaced by property in the judgment of the Trustee of equal value. The Trustee shall not be subject to any liability to any person or persons by reason of any act done or performed in good faith under the provisions of this article.

*Twelfth.*—The bonds secured by these presents are to be issued at the rate of twenty thousand dollars per mile of completed road on the affidavit of the chief engineer of the Railway Company that the number of miles of railroad, in respect to which bonds are to be issued have been so completed and are ready for use, but the total issue of the said bonds shall in no event exceed in gross amount two millions of dollars.

*Thirteenth.*—The Trustee is hereby authorized and directed to certify bonds upon the demand of the president of the Railway Company, to which shall be annexed the said affidavit of the chief engineer or a copy thereof, and it is agreed between the parties hereto, and made part of this contract with the holders of the bonds secured hereby, that the Trustee shall not be required, in respect of the certification of bonds hereunder, to look beyond the demand of the president and the affidavit of the chief engineer as herein provided, and shall not be responsible, in any event, for any act lawfully done in pursuance of such demand and affidavit. And it is further and mutually agreed by and between the parties hereto, and is hereby declared to be a condition upon which the Trustee, and its successor or successors in the trust hereby created, has assented to these presents and accepted this trust, that the Trustee, or its successor or successors, shall not in any manner be held responsible for the act of any person employed by it or them, unless guilty of culpable negligence in the selection of such employee, nor shall the Trustee be answerable except for its own wilful default.

*Fourteenth.*—The Trustee, or its successor or successors, shall be authorized to pay such reasonable compensation as it or they shall deem proper to all attorneys, officers, agents, servants and employees whom they may reasonably employ in the management of this trust, and the Trustee, or its successor or successors, shall have and be entitled to just compensation for all services it or they may render in connection with the trust hereby created, to be paid by the Railway Company, or out of the trust estate.

*Fifteenth.*—The bonds hereinbefore described and hereby secured shall pass by delivery or by transfer on the books of the Railway Company, and after the registration of the ownership of said bonds, certified thereon by the transfer agent of the Railway Company, no transfer of said bonds, except upon the transfer books of the Railway Company, shall be valid, unless

the last transfer shall be to bearer, which transfer to bearer shall again render said bonds transferable by delivery, and the said bonds shall continue subject to successive registration and transfer to bearer, as aforesaid, at the option of each successive holder, provided the coupons issued with the same and not due are attached to said bonds when such registration is desired, but not otherwise, and to this end the Railway Company shall keep in the city of Boston a registration or transfer office, with the necessary books, in which the registration and transfer of said bonds may be made as above provided.

*Sixteenth.*— For the purpose of designating the rolling stock which shall belong to the line of railway herein described, it is agreed, by and between the parties hereto, that the Railway Company will mark, in some substantial manner, all engines and cars of each and every class purchased by it with either the name of the Railway Company or the initials of its name.

*Seventeenth.*— The Railway Company doth hereby covenant, grant and agree to and with the Trustee, and its successors in the trust hereby created, that the Railway Company, its successors or assigns, while remaining in possession of said mortgaged premises, shall and will from time to time and whenever the same shall be due and payable, pay and discharge all taxes, assessments and government charges lawfully imposed upon said mortgaged premises or any part thereof, the lien whereof might or could be held to be prior to the lien of these presents, so that the priority of this mortgage shall be duly preserved, and that the Railway Company, its successors or assigns, shall not or will not do or suffer any matter or thing whatsoever whereby the lien of this mortgage might or could be impaired, until the said bonds hereby secured, with all interest accrued thereon, shall have been fully paid and satisfied.

*Eighteenth.*— The rights of entry and sale hereinbefore granted are intended as cumulative remedies, and shall not be deemed to deprive the Trustee of any legal or equitable remedy by judicial proceedings appropriate to enforce the provisions of this instrument.

*Nineteenth.*— No bondholder or bondholders shall take proceedings to enforce the provisions of this mortgage until after he or they shall have requested the Trustee to foreclose this mortgage and furnished proper indemnity as hereinbefore provided, and the Trustee shall have refused or unreasonably neglected so to do. The Trustee shall have the right to require the person or persons presenting any request, as hereinbefore provided, to furnish proof by affidavits of the signers as to the ownership of the bonds represented by him or them, and if such proof be so required the said request shall be without effect until such proof shall have been furnished.

*Twentieth.*— The Railway Company further covenants that when and as the coupons and interest appertaining to the bonds secured hereby mature and become payable the same shall be paid by it and the coupons canceled; and it is agreed that no purchase or sale of said coupons or interest or advance or loan upon the same, made on behalf of, or at the request of, or with the privity of, the Railway Company, and no redemption of the said coupons or of any of them by any person or persons whatever, shall be taken or operate as keeping the said coupons or interest alive or in force as a lien

upon the mortgaged premises as against the holders of the bonds secured hereby and of the coupons annexed thereto.

*Twenty-first.*—The Railway Company, its successors and assigns, further covenants and agrees with the Trustee and its successor or successors in the trust, to make, execute and deliver all such further deeds, instruments and assurances as may from time to time be necessary, and as the Trustee or its successors in the trust may be advised by counsel learned in the law are necessary for the better securing to the Trustee, its successor or successors in the trust, the premises hereby conveyed, and for carrying out the objects and purposes of this indenture.

*Twenty-second.*—The Railway Company covenants and agrees with the Trustee and its successors, that it will from time to time pay all the expenses of this trust, including the compensation and expense of the transfer agent herein provided for.

*Twenty-third.*—In case of the resignation, insolvency, incapacity or inability for any other reason of the Trustee, or its successor or successors, to act in execution of this trust, the holders of a majority in interest of the said bonds outstanding may select or designate one or more competent persons or a corporation to execute said trust, and the person or persons or corporation so selected shall have all the rights and privileges conferred by this conveyance upon the Trustee, and shall be required to perform the same duties. And the holders of a majority in interest of the said bonds outstanding may, at any time, in the exercise of a sound discretion, and when to such majority in interest it shall seem desirable, upon such terms and conditions as shall be equitable and just, and upon the payment to the Trustee of all its just charges and expenses, remove the Trustee hereunder and may select or designate a successor as aforesaid. But in case of a vacancy in the trusteeship, and if the holders of a majority in interest of the said bonds outstanding shall, after thirty days' continuance of the said vacancy, fail to select or designate a new trustee, then it shall be lawful for any of the bondholders to apply, in writing, to the chief justice of the Supreme Court of the State of South Carolina, or to a circuit judge of the United States in and for the district of South Carolina, to appoint another trustee or trustees to supply the vacancy, and, in the event that such application be made by any of the bondholders, notice of said application shall be given to the Railway Company at least ten days before said application shall be presented, and the said chief justice or the said circuit judge is hereby authorized, upon application and notice as aforesaid, without legal proceedings, to appoint one or more trustees to fill the vacancy, and the trustee or trustees so appointed shall be vested with all the title, powers, duties and assets possessed under this instrument by the said Boston Trust Company of Boston, Trustee, herein named.

In witness whereof, the Railway Company has caused this instrument to be subscribed by its president and secretary and its corporate seal to be hereto affixed; and the Trustee, for the purpose of testifying [SEAL.] its acceptance of the trust hereby created, has also caused these presents to be subscribed by its president and secretary, and its seal to be hereto affixed, this 1st day of May, 1894.



STATE OF SOUTH CAROLINA, } ss.  
County of Redwood, }

Be it remembered that on this 1st day of May, A. D. 1894, before me, George Gascoigne, a notary public in and for the State of South Carolina and county of Redwood, personally appeared James P. Glynn, president, and George Falco, secretary, of the Southeastern Railway Company, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say that he, said James P. Glynn, resides in Manton, State of South Carolina; that he, said James P. Glynn, is the president, and he, said George Falco, is the secretary, of the said Railway Company; that they both know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the board of directors of said company, and that they, the said James P. Glynn, as such president, and he, said George Falco, as such secretary, signed the name of said company, and their own names thereto, by the like order, as president and secretary of said company, respectively, and they each, respectively, being personally known to me to be the same persons whose names are signed to the foregoing instrument as parties thereto, acknowledged to me that they signed, sealed and executed the same as their own free and voluntary act and deed and as the free and voluntary act and deed of the said company, for the consideration, purposes and objects therein stated.

In witness whereof, I have hereunto set my hand and affixed my official seal this the 1st day of May, A. D. 1894.

[SEAL.]

GEORGE GASCOIGNE, Notary Public.

STATE OF MASSACHUSETTS, } ss.  
City of Boston and County of Suffolk, }

Be it remembered that on this 1st day of May, A. D. 1894, personally appeared before me Robert Manning, president, and Thomas Crosman, secretary, of the Boston Trust Company, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say that he, said Robert Manning, resides in Boston, State of Massachusetts; that he, said Robert Manning, is the president, and he, said Thomas Crosman, is the secretary, of the said the Boston Trust Company; that they both know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the board of directors of said company, and that they, the said Robert Manning, as such president, and the said Thomas Crosman, as secretary, signed the name of said company, and their own names, thereto, by the like order, as president and secretary of said company, respectively, and they each, respectively, being personally known to me to be the same persons whose names are signed to the foregoing instrument as parties thereto, acknowledged to me that they signed, sealed and executed the same as their own free and voluntary act and deed, and as the free and voluntary act and deed of said company, for the consideration, purposes and objects therein stated.

In witness whereof, I have hereunto set my hand and affixed my official seal this 1st day of May, A. D. 1894.

[SEAL.]

GEORGE GASCOIGNE, Notary Public.

*Street Railway First Mortgage.*

This indenture, made and entered into this 1st day of November, in the year 1892, by and between the Metropolitan Street Railway Company of Macon, a corporation duly organized and existing under and by virtue of the laws of the State of Georgia, and having its principal office at Macon, in the county of Bibb, in the said State, hereinafter called "the Railway Company," party of the first part, and the Farmers' Loan and Trust Company, of the city of New York, trustee, a corporation duly organized and existing under and by virtue of the laws of the State of New York, hereinafter called "the Trustee," party of the second part, witnesseth:—

Whereas, the Railway Company was duly incorporated under an act of the legislature of the State of Georgia, entitled "An act to incorporate the Metropolitan Street Railway Company of Macon and to define its rights, powers and duties, and for other purposes," approved October 22, 1887, as amended by an act of the said legislature of the State of Georgia, entitled "An act to amend the charter of the Metropolitan Street Railway Company of Macon so as to prohibit said company from taking private property without the consent of the owner thereof; to authorize and empower said company to erect, construct, equip and operate an electric light and power plant, furnish electric lights and other applied use of electricity; and to remove and modify certain restrictions originally imposed upon its powers, rights and functions, and for other purposes," approved December 27, 1890; and

Whereas, the Railway Company hath heretofore been duly authorized and empowered, by sundry municipal ordinances of the said city of Macon, to construct, equip and operate its said lines of street railway in and through certain of the streets of the said city of Macon, and hath been duly authorized and empowered, by due consent of the proper authorities of the said county of Bibb, in the said State of Georgia, to construct, equip and operate its said lines of railway in and through certain of the public roads of the said county, adjacent to the said city of Macon; and

Whereas, the Railway Company hath full right, power and authority, under and by virtue of its charter as aforesaid, and of the municipal ordinances aforesaid, and of the laws of the State of Georgia, among other things to construct, maintain, acquire, own and operate lines of street railway within and adjacent to the said city of Macon, and to do and perform any and all other acts incidental thereto, and to borrow money, and to issue its bonds therefor, and to pledge, by mortgage or deed of trust, its corporate property, rights and franchises to secure the payment thereof; and

Whereas, the Railway Company hath, pursuant to the authority hereinbefore referred to, constructed and equipped and is now operating its certain lines of street railway within and adjacent to the said city of Macon, as and in the manner hereinafter more particularly set forth; and

Whereas, the Railway Company, in order to meet the cost and expense of constructing, building, equipping and putting into operation its lines of street railway as aforesaid within and adjacent to the city of Macon, in the county of Bibb, and State of Georgia, and for the purpose of paying and discharging its floating indebtedness, and of securing money needed for its

proper business, hath resolved to issue and negotiate a series of twenty-year first-mortgage gold bonds of one thousand dollars each, the total issue whereof secured by this indenture of mortgage shall not exceed the aggregate amount of one hundred and twenty-five thousand dollars (\$125,000), all of which bear date the 1st day of November, 1892, and are equally and alike secured by this indenture of mortgage, without preference, priority or distinction of one bond over another, and without reference to the time of the actual issue thereof, and are made payable to bearer twenty years after the 1st day of November, 1892, with interest from their date at the rate of six per centum per annum, payable semi-annually on the 1st days of May and November of each year, upon the presentation and surrender of the respective interest coupons belonging thereto as they severally become due, the principal and interest whereof are payable at the office of the Farmers' Loan and Trust Company in the city of New York, or at any fiscal agency which may hereafter in the said city be substituted in its place, and are to be paid in gold coin of the United States, of or equal to the present standard of weight and fineness as fixed by the laws of the congress of the United States now in force, without diminution on account of any income or other tax which hereafter may be levied or provided for under any of the laws of the State of Georgia or of the United States; and

Whereas, the stockholders of the Railway Company, at a meeting duly called and holden at the general office of the company, in the city of Macon, Georgia, on the 15th day of October, 1892, did, by a unanimous vote of the holders of all of the then outstanding stock of the company, duly authorize, direct and approve the issue of the bonds herein provided for, and the making of this indenture of mortgage, and the conveyance and transfer of all the property hereinafter described, to the Trustee, as security for the payment of the said bonds at their maturity, and of the interest to accrue due thereon, according to the terms and for the purposes in these presents declared; and

Whereas, this indenture of mortgage hath also been duly authorized and approved by a resolution of the board of directors of the Railway Company, unanimously passed, at a meeting duly called and holden at the general office of the company in the city of Macon, Georgia, upon the said 15th day of October, 1892, and the said board of directors hath also authorized and directed the bonds to be issued hereunder substantially in the form following:—

#### UNITED STATES OF AMERICA.

#### STATE OF GEORGIA.

#### METROPOLITAN STREET RAILWAY COMPANY OF MACON.

#### TWENTY-YEAR FIRST-MORTGAGE SIX PER CENT. GOLD BOND.

No. —, \$1,000.

Twenty years after the 1st day of November, in the year 1892, for value received, the Metropolitan Street Railway Company of Macon, a corporation duly organized and existing under and by virtue of the laws of the State of Georgia, promises to pay to the bearer, or, in case this bond be registered, then to the registered holder thereof, at the office of the Farmers' Loan and

Trust Company in the city of New York, one thousand dollars; and also promises to pay interest thereon at and after the rate of six per centum per annum, payable semi-annually on the 1st days of May and November in each year, upon the presentation and surrender of the respective interest coupons hereto annexed or belonging hereto as they severally become due, at the office of the Farmers' Loan and Trust Company aforesaid. The principal and interest of this bond are to be paid in gold coin of the United States of America, of or equal to the present standard of weight and fineness, as fixed by the laws of the United States now in force, without diminution on account of any income or other tax which hereafter may be levied or provided for under any of the laws of the State of Georgia or of the United States. The benefit of any extension, redemption, stay or appraisal laws now existing, or that may hereafter exist, is hereby expressly waived, but the stockholders of this company are not individually liable upon this bond or in respect thereto.

This bond is one of a series of one hundred and twenty-five bonds of one thousand dollars each, all of the same tenor and date, numbered consecutively from number one upwards, the total issue whereof in amount shall not exceed one hundred and twenty-five thousand dollars, the principal and interest of all of which are equally and alike secured by a mortgage or deed of trust, to which reference is hereby made, bearing date the 1st day of November, 1892, duly executed by the said Railway Company to the Farmers' Loan and Trust Company, of the city of New York, as trustee, conveying, in trust for the holders of the said bonds, all and singular the entire line of the said company's railway within and adjacent to the city of Macon, in the county of Bibb, and State of Georgia, built or to be built, together with all the other corporate property, real and personal, and all the income, tolls, issues and profits therefrom, and the rolling stock, equipment, material, rights of way, tracks, depots, power-houses, shop or shop grounds, terminals, warehouses, demands, lands, tenements, hereditaments, appurtenances, rights, privileges and franchises, now owned or hereafter acquired, as in the said mortgage or deed of trust is fully declared.

And upon default in the payment of any semi-annual instalment of interest upon this bond for a period of three months after such interest shall become due and payable and shall have been duly demanded, the Trustee may, subject to the conditions of the mortgage or deed of trust aforesaid, declare the principal of this bond immediately due and payable, and shall and must so act and declare if and when required in writing by the holders of one-half in amount of all such bonds outstanding.

This bond shall pass by delivery or by transfer on the books of the transfer agent of the said Railway Company, but after a registration of the ownership of this bond certified hereon by the transfer agent aforesaid, no subsequent transfer, except upon the said transfer books, shall be valid, unless the transfer shall be to bearer, and when made to bearer such transfer shall again render this bond transferable by delivery, and it shall so continue subject to successive registration and transfer to the bearer as aforesaid, at the option of each successive holder, provided the coupons issued herewith and not due are attached hereto when such registration is demanded.

This bond is to be valid only when authenticated by the certificate in-

dorsed hereon, duly signed by the Trustee or its successor or successors in the trust.

In witness whereof, the Metropolitan Street Railway Company of Macon hath caused this bond to be subscribed by its president and secretary, and its corporate seal to be affixed hereto, on this 1st day of November, 1892, and the annexed coupons to be executed with the engraved signature of its treasurer.

METROPOLITAN STREET RAILWAY COMPANY OF MACON,

By ———, President.

Attest: ———, Secretary.

*(Coupon or Interest Warrant No. 1.)*

No. ———.

\$30.

The Metropolitan Street Railway Company of Macon, Georgia, will pay to bearer, at the office of the Farmers' Loan and Trust Company, in the city of New York, \$30 in United States gold coin, on the 1st day of May, 1893, being six months' interest then due on its first-mortgage gold bond No. ———, Treasurer.

*(Trustee's Certificate to be Indorsed.)*

It is hereby certified that the Metropolitan Street Railway Company of Macon has executed to the Farmers' Loan and Trust Company, of the city of New York, as trustee, a mortgage or deed of trust, dated November 1, 1892, as described in this bond, to secure the same, and that this bond is one of the bonds issued thereunder.

THE FARMERS' LOAN AND TRUST COMPANY,

By ———, Vice-President.

*Indorsement.*

No. ———.

METROPOLITAN STREET RAILWAY COMPANY OF MACON.

\$1,000 First-Mortgage Gold Bond.

Interest Six Per Cent.

Principal Payable November 1, 1912, in United States Gold Coin.

Interest Payable May 1st and November 1st in the City of New York.

Now, therefore, this indenture witnesseth: — That the Railway Company, for the better security of the payment of the said bonds, as hereinbefore set forth, with the interest thereon, unto the person or persons, body or bodies politic and corporate, who may become the holder or holders of the said bonds or of any of them, his, her or their executors, administrators, successors or assigns, and in consideration of the sum of \$1 by the Trustee paid to the Railway Company, at or before the signing, ensembling and delivery hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, released, conveyed and confirmed, and by these presents doth hereby grant, bargain, sell, release, convey and confirm unto the Trustee and to its successor or successors in this trust forever, all and singular its said lines of street railway within and adjacent to the said city of Macon, in the county of Bibb, and the State of Georgia, together with all

rolling stock, equipment and materials, all rights of way, tracks, road-bed, superstructure, sidings, switches, power-houses, machinery, fixtures and franchises, including therein the right and franchise to operate the said railway, and including and meaning to include all the property of every name, nature and description, real and personal, now owned and acquired, or which hereafter may be acquired, by the Railway Company within or adjacent to the said city of Macon, used for, or in anywise appertaining to, the operation of the said railway and real property, being more particularly described as follows:—

(a) A line of electric street railway, commencing at the intersection of Fourth and Cherry streets, in the said city of Macon, thence along Cherry street to First street, thence along First street to Cotton avenue, thence along Cotton avenue to Forsyth Terrace (or street), thence along Forsyth Terrace (or street) to Monroe street, thence along Monroe street to Chestnut street, thence along Chestnut street to Adams street, thence along Adams street to Hazel street, thence along Hazel street to and across Boundary street to Lawton avenue, thence along Lawton avenue to Bellevue avenue, thence along Bellevue avenue to and into Bellevue, a total distance of five and twenty-five one-hundredths (5.25) miles.

(b) All that certain lot, piece or parcel of land situate, lying and being in the Vineville district, county of Bibb, and State of Georgia, said lot being on the north side of the line of railway of the Metropolitan Street Railway Company, being two hundred (200) feet along the boulevard on which the said line of street railway is constructed, the southwest corner of said lot being in the middle of the branch dividing the said lot from the homestead property on which G. H. Dillon now resides, the said lot containing one acre, bounded on the west by the land of the said G. H. Dillon, on the north by the land of A. M. Ernest, on the east by the land of A. M. Ernest, on the south by the boulevard on which the said line of street railway is now constructed, as more clearly defined by stakes at the several corners.

(c) All that certain lot, piece or parcel of land situate, lying and being in the Vineville district, county of Bibb, and State of Georgia, said lot being on the north side of Lawton avenue, being one hundred and forty (140) feet along the said Lawton avenue, and fronting fifty-one (51) feet on Randolph avenue, said lot being lot number one (1), block number eleven (11), on plot of Huguenin Heights, and rectangular in shape, being fifty-one (51) by one hundred and forty (140) feet, the same being the lot on which is located the car-house of the Railway Company.

To have and to hold all and singular the said property and lines of railway, with their appurtenances, rolling stock and equipment, present and future, and all other premises, properties, rights, interests, franchises, revenues, tolls, income, immunities, privileges and other things aforesaid to the Trustee, as aforesaid, and its successors, and their heirs and assigns forever: in trust, nevertheless, for the equal *pro rata* use, benefit and security of all persons and corporations who shall become or be the owners or lawful holders of any of the said bonds to the aggregate amount of one hundred and twenty-five thousand dollars (\$125,000), intended to be hereby secured as aforesaid, or of any of the coupons appertaining thereto, without preference of any of the said bonds over the other, by reason of priority in the time of

the issue or negotiation thereof or otherwise, upon the following trusts, conditions, covenants and agreements, to wit:—

*First.*—Upon the execution and delivery of this indenture of mortgage, and the due recording and filing thereof according to law, all of the aforesaid bonds, to the full amount of one hundred and twenty-five thousand dollars (\$125,000) par thereof, with their respective coupons attached, shall forthwith be executed and delivered by the Railway Company to the Trustee, and shall be duly certified by the Trustee, and shall be by it delivered and disposed of as follows:—

(a) One hundred thousand dollars (\$100,000) par of the said bonds, with their attached coupons (being bonds numbered from one (1) to one hundred (100) inclusive), duly certified, shall be immediately delivered to the Railway Company, or to its order.

(b) The remainder of the said bonds to the amount of twenty-five thousand dollars (\$25,000) par thereof, with their attached coupons (being bonds numbered from one hundred and one (101) to one hundred and twenty-five (125) inclusive), shall be held and retained by the Trustee, and shall from time to time be paid over and delivered by it to the Railway Company, or to its order, for the sole purpose of reimbursing the Railway Company for expenditures hereafter actually incurred in the construction or reconstruction, equipment or re-equipment, according to its ordinances and franchises, of its railway plant and property, upon the presentation by the Railway Company to the Trustee of sworn statements, made in writing by the president and secretary of the Railway Company, attested by the corporate seal, evidencing such expenditures. But the total issue of the said bonds secured by this indenture of mortgage shall in no event exceed in gross amount one hundred and twenty-five thousand dollars (\$125,000) as aforesaid, nor shall the said bonds be issued at any higher rate than twenty thousand dollars (\$20,000) per mile of road actually built and in operation.

*Second.*—Upon the payment of the principal and interest of all the outstanding bonds hereby secured, the estate hereby granted to the Trustee shall be void, and the right to all the real and personal property hereby granted and conveyed shall revert to and revest in the Railway Company, its successors or assigns, without any acknowledgment of satisfaction, reconveyance, surrender, re-entry or other act.

*Third.*—In case the Railway Company, its successors or assigns, shall fail to pay the interest on any of the said bonds at the time when the same shall become due and payable according to the tenor thereof, and shall continue in such default for the full period of three months after such payment has been duly demanded at the office of the Farmers' Loan and Trust Company in the city of New York, or of its successor or successors in the trust hereby created, or shall fail in the performance of any of the covenants herein contained on its part to be kept and performed, and if such default shall continue for a period of three months, then and thereupon the principal of all the bonds hereby secured shall be and become immediately due and payable, whensoever thereafter, the default still continuing, the Trustee shall give written notice to the Railway Company, its successors or assigns, of its option to that effect; and the Trustee shall and must give such notice, if and when required in writing so to do by the holders of one-half of the said bonds then outstanding.

*Fourth.*— Upon such default the Trustee, or its successor or successors in the trust hereby created, may, in its or their discretion, and shall and must, upon the request in writing of the holders of one-half of the said bonds then outstanding, and upon receiving proper indemnity against the costs and expenses which may be incurred by acting in pursuance of such request, take actual possession of said railway and of all and singular the property, things and effects hereby conveyed, and personally or by attorney or agent manage and operate the same and receive all the tolls, rents, income and profits thereof, until such time as the said bonds and the interest thereon are fully paid or satisfied, and shall apply the money so received by it, first, to the expenses of the trust hereby created, and to the management and operation of the said railway and its appurtenances to the needful repairs thereof; second, to the payment of interest overdue upon the said bonds, and then to the payment of the principal of the said bonds.

*Fifth.*— The Trustee, or its successor or successors in the trust hereby created, upon becoming entitled to take possession of the railway and property as aforesaid, may in its or their discretion, and shall and must, upon the written request of the holders of one-half of the said bonds then outstanding, and upon receiving proper indemnity against the costs and expenses which may be incurred by acting in pursuance of such request, cause the said premises so mortgaged to be sold, either as a whole or in such parcels as shall seem necessary and proper, having due regard to the interest of all parties, to the highest bidder at public auction, in the city of Macon, Georgia, or in the city of New York, at the option of the Trustee, after giving at least sixty days' notice of the time, place and terms of the sale and of the specific property to be sold, by printed notice published in one or more newspapers in the said city of Macon, Georgia, and in one or more newspapers in the city of New York, once in each week during the said term of sixty days. Upon receiving the purchase-money therefor the Trustee, or its successor or successors in the trust hereby created, shall execute to the purchaser or purchasers thereof a good and sufficient deed of conveyance in fee-simple, which sale and conveyance shall forever be a bar against the Railway Company, its successors and assigns, and all persons claiming under it or them, of all right, estate, interest or claim in or to the premises, property, things, franchises, privileges and immunities so sold, or to any part thereof, whether the Trustee be in the possession thereof or not, and the receipt of the Trustee shall be a full and sufficient discharge to such purchaser, and no purchaser holding such receipt shall be liable for the proper application of the purchase-money, or be in any way bound to see that the same is applied to the uses of this trust, or be in any manner answerable for its loss or misapplication, or be bound to inquire into the authority for making such sale.

*Sixth.*— The Trustee shall, after deducting from the proceeds of such sale the costs and expenses thereof and of the execution of this trust and all payments for taxes, assessments and counsel fees and other reasonable compensation, apply so much of the proceeds as may be necessary to the payment of the principal and interest remaining unpaid upon the said bonds and coupons, without giving preference to either principal or interest, it being the intention of this indenture of mortgage that, so long as the rail-



way and its appurtenances shall be managed by the Trustee or by a receiver, as a going concern, the income shall be applied to the payment of interest in preference to principal, but that, after the sale of the railway and its appurtenances, no such preference shall be made in the distribution of the proceeds.

*Seventh.*—The Trustee may, if it shall so elect, instead of pursuing the remedies hereinbefore provided, by taking actual possession of the property and selling the same, proceed by proper legal proceedings for the foreclosure of the mortgage, and the appointment of a receiver and a sale under and pursuant to a decree of any court of competent jurisdiction.

*Eighth.*—Upon any sale of the premises, whether by the Trustee, after entry as aforesaid, or under the decree of any court of competent jurisdiction, the holders of the bonds hereby secured or of any of them, or the Trustee on behalf of all the bondholders, shall have a right to purchase, upon equal terms with other persons, and it shall be the duty of the Trustee, if so required in writing a reasonable time before such sale by the holders of a majority in value of the outstanding bonds secured hereby, and upon being offered at the same time adequate indemnity against all liability to be incurred thereby, to make such purchase on behalf of all of the bondholders at a reasonable price, whether part only or the whole of the property hereby conveyed is sold at a price not exceeding the whole amount, principal and interest, due or accrued upon the said bonds, together with the expenses of the proceedings and sale, and the bonds secured by this mortgage shall be receivable at such sale as cash for the amount of cash which would be payable on such bonds out of the proceeds of such sale.

*Ninth.*—In the case of the purchase of the said property or of any part thereof by the Trustee, the same shall be held for the benefit of all of the bondholders in proportion to their respective interest in the bonds, and the property thus purchased shall be conveyed to such persons or corporation as may be designated by a majority in value of the bondholders, in such manner as shall conform to the requirements of the laws of the State of Georgia; provided that such conveyance shall be made on such terms as will, in the judgment of the Trustee, secure to each and every bondholder his just proportion and right in the property purchased as aforesaid.

*Tenth.*—Meetings of the bondholders for any of the purposes referred to in this mortgage may be called by the Trustee in its discretion upon reasonable public notice, to be published in two newspapers in the city of New York, and to be held at a time and place to be designated in such notice.

*Eleventh.*—The Railway Company for itself, its successors and assigns, hereby agrees to waive, and doth hereby absolutely and irrevocably waive and relinquish, the benefit and advantage of any and all valuation, stay, appraisement, redemption or extension laws of the State of Georgia or of the United States which but for this provision, agreement and waiver might be applicable to any sale made under the provisions of this instrument or by the order or decree of any court or courts; and the Railway Company for itself, its successors and assigns, agrees to waive, and doth hereby irrevocably waive, any and all rights of redemption which it might or could otherwise have or be entitled to under any present or future laws of the State of Georgia or of the United States, upon or after or in respect of any

sale of the hereby mortgaged premises, properties, rights and franchises, or of any part thereof; and the Railway Company hereby covenants that it, its successors and assigns, will not in any manner set up or seek to take the benefit or advantage of any such present or future valuation, stay, appraisal, extension or redemption laws, to prevent or hinder or delay such absolute and irredeemable sale of the said mortgaged premises, properties, rights and franchises, as is hereinbefore authorized to be made, as might, but for such law or laws, be directed or decreed by any court of competent jurisdiction.

*Twelfth.*— Until default shall be made in the payment of the interest, or of some part thereof, or in the payment of the principal of the said bonds, or in the due performance of any of the covenants herein contained on its part to be kept and performed, the Railway Company shall remain in the full possession of the said mortgaged property, and shall be suffered and permitted to possess, manage, operate, develop and enjoy the street railway plant, rights, franchises and property herein conveyed and intended so to be, and to take, use and dispose of the current revenue and income of all of the said property and railway hereby conveyed, in such manner as it may deem best, to the same extent and to the same effect as though this indenture of mortgage had not been made; and while the Railway Company shall be in the possession of the said mortgaged premises, and there shall be no existing default in the payment of principal or interest of any of the said bonds, or in the performance of any of the stipulations, covenants, conditions and provisions on the part of the Railway Company in this indenture of mortgage contained, the Railway Company, its successors or assigns, may, from time to time, sell or otherwise dispose of, free and clear from the lien or operation of this mortgage, any rolling stock, equipment or other personal property intended for use upon the said line of railway which shall have become worn out or otherwise unsuitable for use, or whenever it shall be intended to replace the same by other rolling stock, equipment or personal property; provided, however, that such sale or disposition shall not impair or reduce the efficiency of the rolling stock, equipment or other personal property required for the proper working of the road, and that all rolling stock, equipment or other personal property which shall from time to time be acquired for use on the said railway or any of the extensions thereof, by the Railway Company, its successors or assigns, with the proceeds of any sale or disposition as aforesaid, or otherwise, shall be subject to the lien of these presents. While the Railway Company shall be in possession of the mortgaged premises, and there shall be no existing default as aforesaid, the Trustee, or its successor or successors in the trust hereby created, shall have full power and authority, in its or their discretion, upon the application, in writing, of the Railway Company, to release from the lien and operation of this mortgage any part of the mortgaged property; provided, however, that under this authority no portion of the main track of the said railway, nor any part of the principal depots or terminal facilities, or other property, which in the judgment of the Trustee is or may be essential to the due operation of the said railway, shall be so released, unless replaced by property in the judgment of the Trustee of equal value.

*Thirteenth.*—The bonds hereinbefore described and hereby secured shall pass by delivery or by transfer on the books of the Railway Company, and after the registration of the ownership of the said bonds, certified thereon by the Trustee as the registrar of the Railway Company, no transfer of said bonds, except upon the registration or transfer books of the Railway Company, shall be valid, unless the last transfer shall be to bearer, which transfer to bearer shall again render said bonds transferable by delivery, and the said bonds shall continue subject to successive registration and transfer to bearer, as aforesaid, at the option of each successive holder, provided the coupons issued with the same and not due are attached to said bonds when such registration is desired, but not otherwise; and to this end the Railway Company shall keep, at the office of the Farmers' Loan and Trust Company, in the city of New York, a registration or transfer office, with the necessary books, in which the registration and transfer of said bonds may be made as above provided.

*Fourteenth.*—For the purpose of designating the rolling stock which shall belong to the line of railway herein described, it is agreed by and between the parties hereto that the Railway Company will mark, in some substantial manner, all cars of each and every class purchased by it either with the name of the Railway Company or with the initials of its name.

*Fifteenth.*—The Railway Company doth hereby covenant and agree with the Trustee and its successor or successors in the trust hereby created, that, while remaining in possession of the said mortgaged premises, it will from time to time, and whenever the same shall be due and payable, pay and discharge all taxes, assessments and governmental charges, lawfully assessed or imposed upon the said mortgaged premises or upon any part thereof, the lien whereof might or could be held to be prior to the lien of these presents, so that the priority of this mortgage shall be duly preserved, and that it will diligently preserve the rights and franchises now or hereafter granted to or conferred upon it by the laws of the State of Georgia or by the ordinances or laws of the city of Macon or of the county of Bibb as aforesaid, and that it will not do or suffer any matter or thing whatsoever whereby the lien of this mortgage might or could be impaired, until the said bonds hereby secured, with all the interest accrued thereon, shall have been fully paid and satisfied.

*Sixteenth.*—The Railway Company doth hereby covenant and agree that, using and operating its street railway tracks and lines as the same are now constructed, or as the same may hereafter be constructed or extended, it will at all times maintain the said tracks and lines and every part thereof, together with the rolling stock, fixtures and appurtenances, in thorough repair, working order and condition, and fully supplied with motive power and equipment, and that it will from time to time make all needful and proper repairs and replacements, so that the traffic and business of the road and of every part thereof shall at all times be done with safety, economy, promptness and dispatch, and that, upon the failure of the Railway Company so to do, then, after ten days' notice from the Trustee to the Railway Company of such failure or default, the Trustee shall be and is hereby authorized, in its discretion, to take possession of all the said mortgaged property, or to have a receiver take possession thereof, and to hold and operate

the same until the said failure or default shall, at the cost and expense of the Railway Company, have been fully repaired.

*Seventeenth.*—The Railway Company doth hereby covenant and agree that it will keep insured its rolling stock, machinery, buildings and all other property provided for use in connection with its street railway, in the same manner and to the same extent as such property is usually insured by like railway companies, and that all policies of insurance shall be so drawn as to make the moneys accruing thereunder, in case of loss, payable to the Trustee, as its interest may appear. In case of loss the insurance money shall be applied by the Trustee, or by the Railway Company as its agent, toward the renewal of or additions to the property destroyed or injured. The Railway Company further agrees at all times, on due notice and request, to furnish the Trustee a schedule showing with reasonable detail the items of the estate, property and other things covered or intended to be covered by the lien of this indenture of mortgage.

*Eighteenth.*—The rights of entry and sale hereinbefore granted are intended as cumulative remedies, and shall not be deemed to deprive the Trustee of any legal or equitable remedy by judicial proceedings appropriate to enforce the provisions of this instrument.

*Nineteenth.*—The Railway Company further covenants and agrees that, when the principal sum of the said bonds matures and becomes payable, the same shall be fully paid and discharged by it, and that, when and as the coupons and interest warrants appertaining to the bonds secured hereby mature and become payable, the same shall be paid by it and the coupons canceled; and it is agreed that no purchase or sale of said coupons or interest warrants, or advance or loan upon the same, made on behalf of, or at the request of, or with the privity of the Railway Company, and no redemption of the said coupons or of any of them by any person or persons whatever, shall be taken or operate as keeping the said coupons or interest warrants alive or in force as a lien upon the mortgaged premises as against the holders of the bonds secured hereby and of the coupons annexed thereto.

*Twentieth.*—The Railway Company, its successors and assigns, further covenants and agrees with the Trustee and its successor or successors in the trust hereby created, that it will do and perform all acts necessary and proper to keep valid the lien hereby created or intended to be created, and that it will make, execute and deliver all such further deeds, instruments and assurances as may, from time to time, be necessary, and as the Trustee, or its successor or successors in the trust hereby created, may be advised by counsel learned in the law are necessary for the better securing to the Trustee, its successor or successors in the trust hereby created, the premises hereby conveyed, and for the carrying out the objects and purposes of this indenture.

*Twenty-first.*—The Railway Company covenants and agrees with the Trustee and its successor or successors in the trust hereby created, that it will, from time to time, pay all the expenses of this trust, including the compensation and expense of the registration of the bonds hereinbefore provided for.

*Twenty-second.*— The right of action under this indenture of mortgage is vested exclusively in the Trustee, and under no circumstances shall any bondholder or bondholders have any right to institute an action or other proceeding on or under this indenture for the purpose of enforcing any remedy herein and hereby provided, or of foreclosing this mortgage, except in case of a refusal on the part of the Trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the Trustee according to its sound discretion; but the Trustee shall be under no obligation to institute any such suit, or to take any proceedings under this indenture, or to enter any appearance or in any way defend any suit in which it may be made defendant, or to do anything whatever as Trustee, until it shall be indemnified to its satisfaction from any and all costs and expenses, outlays and counsel fees and other reasonable disbursements, and from all possible claims for damages, for which it may become liable or responsible on proceeding to carry out such request or demand. The Trustee may nevertheless begin suit, or appear in and defend any suit or suits, or do anything else in its judgment proper to be done by it as such Trustee, without such indemnity, and in such case it shall be compensated therefor from the trust fund.

*Twenty-third.*— The Trustee shall be under no obligation to recognize any person as holder or owner of any of the bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any person, until such supposed holder or owner shall produce said bonds and deposit the same with the Trustee.

*Twenty-fourth.*— It shall be no part of the duty of the Trustee to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed, or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the Trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done. It shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act or default of any agent, attorney or employee selected with reasonable discretion. It shall be entitled to be reimbursed all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it may at any time perform in the discharge of the same; and all such fees, commissions, compensation and disbursements shall constitute a lien on the mortgaged property and premises.

*Twenty-fifth.*— In case that at any time it shall be necessary and proper for the Trustee to make any investigation respecting any facts preparatory to taking or not taking any action, or doing or not doing any thing as such

Trustee, the certificate of the Railway Company, under its corporate seal, attested by the signature of its president and secretary, shall be conclusive evidence of such fact to protect the Trustee in any action that it may take by reason of the supposed existence of such fact.

*Twenty-sixth.*— All recitals, statements of fact and representations herein contained are made on behalf of the Railway Company, and the Trustee assumes no responsibility as to the correctness of the same; nor is the Trustee to be understood as making any representations as to the character, extent or value of the above-described property, or as to the title thereto.

*Twenty-seventh.*— In case of the resignation, insolvency, incapacity, or inability for any other reason, of the Trustee, or its successor or successors in the trust hereby created, to act in execution of this trust, the holders of a majority in interest of the said bonds outstanding may select or designate one or more competent persons or a corporation to execute said trust, and the person or persons or corporation so selected shall have all the rights and privileges conferred by this indenture upon the Trustee, and shall be required to perform the same duties. But in case of a vacancy in the trusteeship, and if the holders of a majority in interest of the said bonds outstanding shall, after thirty days' continuance of the said vacancy, fail to select or designate a new trustee, then it shall be lawful for any of the bondholders to apply, in writing, to the then judge of the superior court of the county of Bibb, in the State of Georgia, or to a circuit judge of the United States in and for the southern district of Georgia, to appoint another trustee or trustees to supply the vacancy, and in the event that such application be made by any of the bondholders, notice of said application shall be given to the Railway Company at least ten days before said application shall be presented, and the said judge of the superior court, or the said circuit judge, is hereby authorized, upon application and notice as aforesaid, without legal proceedings, to appoint one or more trustees to fill the vacancy, and the trustee or trustees so appointed shall be vested with all the title, powers, duties and assets possessed under this instrument by the said the Farmers' Loan and Trust Company, of the city of New York, trustee herein named.

In witness whereof, the Railway Company hath caused these presents to be sealed with its corporate seal, and hath caused the same to be signed in its name by its president and to be attested by its secretary, and the Trustee, to evidence its acceptance of the trust hereof, hath caused its corporate name and seal to be hereto set by its authorized officers, the day and year first above written.

METROPOLITAN STREET RAILWAY COMPANY OF MACON,

By ———, President.

Attest: ———, Secretary.

Signed, sealed and acknowledged in our presence:

———,  
———.

THE FARMERS' LOAN AND TRUST COMPANY,

By ———, President.

Attest: ———, Secretary.

Signed, sealed and acknowledged in our presence:

———,  
———.

STATE OF GEORGIA, } ss.  
County of Bibb,

Be it remembered that on this — day of November, A. D. 1892, before me, —, a notary public in and for the State of Georgia and county of Bibb, personally appeared E. G. Harris, president, and W. F. Elder, secretary, of the Metropolitan Street Railway Company of Macon, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say that he, said E. G. Harris, resides in Macon, State of Georgia; that he, said E. G. Harris, is the president, and he, said W. F. Elder, is the secretary, of the said Metropolitan Street Railway Company of Macon; that they both know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the board of directors of said company, and that they, the said E. G. Harris as such president, and the said W. F. Elder as such secretary, signed the name of said company and their own names thereto by the like order, as president and secretary of the said company respectively, and they each respectively being personally known to me to be the same persons whose names are signed to the foregoing instrument as parties thereto, acknowledged to me that they signed, sealed and executed the same as their own free and voluntary act and deed and as the free and voluntary act and deed of the said company for the consideration, purposes and objects therein stated.

In witness whereof I have hereunto set my hand and affixed my official seal at the said city of Macon, this the — day of November, A. D. 1892.

[SEAL.]

—, Notary Public.

STATE OF NEW YORK, } ss.  
City and County of New York,

Be it remembered that on this — day of November, A. D. 1892, before me, a notary public in and for the State and county of New York, personally appeared Rosewell G. Rolston, president, and E. S. Marston, secretary, of the Farmers' Loan and Trust Company, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say that he, said Rosewell G. Rolston, resides in New York City, State of New York; that he, said Rosewell G. Rolston, is the president, and he, said E. S. Marston, is the secretary, of the said the Farmers' Loan and Trust Company; that they both know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the board of directors of said company, and that they, the said Rosewell G. Rolston as such president, and the said E. S. Marston as such secretary, signed the name of said company and their own names thereto by the like order, as president and secretary of said company respectively, and they each respectively, being personally known to me to be the same persons whose names are signed to the foregoing instrument as parties thereto, acknowledged to me that they signed, sealed and executed the same as their own free and voluntary act and deed, and as the free and voluntary act and deed of the said company for the consideration, purposes and objects therein stated.

In witness whereof I have hereunto set my hand and affixed my official seal at the said city of New York, this the — day of November, A. D. 1892.

[SEAL.]

—, Notary Public.

*Receiver's Certificate.*

UNITED STATES OF AMERICA.

STATE OF TEXAS.

— EAST LINE AND RED RIVER RAILROAD. No. —.

GREENVILLE, TEXAS, —, 1892.

One year after date, unless sooner paid, for value received, I promise to pay to — or his assigns, or, when properly indorsed, to bearer, the sum of one thousand dollars with interest thereon at the rate of six per cent. per annum, payable semi-annually from date of issue, at the banking house of Poor & Greenough, in the city of New York. This loan is made under and by virtue of certain orders of the district court of Travis county, to wit, an order of the 9th day of March, 1892, and an order of the 15th day of April, 1892, a copy of which last order is indorsed hereon, and is expressly made a part hereof.

This certificate is payable one year from date, or sooner, at the option of the receiver, after sixty days' notice published once a week in the New York *Evening Post*, and may be renewed for one year, after maturity, at the discretion of the receiver, but the same shall in no event be renewed more than once, or for any period longer than two years from its issue. The said loan shall be used exclusively by the receiver for the purpose herein stated, and for that purpose shall be kept separate from the other funds of the operating department.

The said certificates to be issued only as occasion requires, and to be dated upon the day of their issue, and to be numbered consecutively from one to four hundred, both inclusive, and for that purpose the certificates issued by virtue of the orders aforesaid are limited to four hundred each of the denomination of one thousand dollars, and are made a first lien upon all the standard gauge property of every name, nature and description, pertaining to said railway when so widened, in the hands of the receiver, including road-bed, track and rolling stock, shops, depots, round-houses, and other property in and between Jefferson, in Marion county, and McKinney, in Collin county, Texas, and heretofore known as the East Line and Red River Railroad; and the earnings of said line from Jefferson to McKinney, after deducting operating expenses, floating debt and the expenses of the receivership, are pledged for the payment of the principal and interest of this obligation according to the tenor hereof.

— — —  
As Receiver of the East Line and Red River Railroad.

*Void if detached.*

EAST LINE AND RED RIVER RAILROAD.

The receiver will pay to the bearer at the banking house of Poor & Greenough, in the city of New York, thirty dollars, — month— from date of the certificate to which this coupon is attached, being six months' interest on certificate.

W. M. GILES.



DISTRICT COURT, TRAVIS COUNTY, TEXAS, 26TH JUDICIAL DISTRICT, FRIDAY, APRIL 15, 1892.

THE STATE OF TEXAS  
No. 8692. vs.  
THE EAST LINE AND RED RIVER RAIL-  
ROAD COMPANY.

In the matter of the petition of William M. Giles, receiver of the railway and property of the late East Line and Red River Railroad Company, for leave to borrow money to widen the gauge from Greenville to Jefferson, to approve the contract made by said receiver therefor, and to settle the form of the receiver's certificate to be issued by him on account thereof.

It having heretofore appeared to the court that it is expedient to widen the gauge of the line of road from Greenville to Jefferson and to procure adequate equipment therefor, and that the necessary and proper outlay for such reconstruction and equipment need not exceed the sum of four hundred thousand (\$400,000) dollars, and the court having at this term made an order upon this behalf and to that effect, and a contract between William M. Giles, receiver, and the Southwestern Company as contractor, being exhibited to the court by the receiver for confirmation: Now, on motion of John T. Craddock and Sawnie Robertson, Esqrs., of counsel for the receiver, and after hearing Messrs. Fisher and Townes, of counsel for the directors, and stockholders, of the late East Line and Red River Railroad Company, and of the Central Trust Company, and Simon Sterne, Esq., of counsel for Henry W. Poor, trustee, and it appearing that all parties herein have been duly notified of this motion:

It is ordered, adjudged and decreed that the said contract be and is hereby approved, and that William M. Giles, the receiver heretofore appointed by this court, and now in possession, as receiver, of the line of railway and property of the late East Line and Red River Railroad Company, be and he hereby is authorized and empowered to borrow the said sum of (\$400,000) four hundred thousand dollars for a term not to exceed two years at the rate of interest of six per cent. per annum, to be used only for the purposes of widening the gauge of that part of the line as aforesaid which is now a narrow-gauge line, and for equipment therefor, and to issue as receiver from time to time, according to the terms of said contract, to the person or persons advancing the said sum of money, or any part thereof, or to the contractor performing the work and furnishing material, labor, supplies or equipment, the Southern Company aforesaid, or its assigns, his certificate of indebtedness in amounts not less than one thousand dollars (\$1,000) each, with coupons or interest warrants attached, expressing the amount so advanced, and the terms upon which the same is to be repaid, which certificate shall be in the form substantially as expressed in said contract, to wit, as follows:—

UNITED STATES OF AMERICA, STATE OF TEXAS.

\$1,000. EAST LINE AND RED RIVER RAILROAD. No. —.  
GREENVILLE, TEXAS, —, 1892.

One year after date, unless sooner paid, for value received, I promise to pay to — or his assigns, or, when properly indorsed, to bearer, the sum

of one thousand dollars with interest thereon at the rate of six per cent. per annum, payable semi-annually, from date of issue, at the banking house of Poor & Greenough, in the city of New York. This loan is made under and by virtue of certain orders of the district court of Travis county, to wit, an order of the 9th day of March, 1892, and an order of the 15th day of April, 1892, a copy of which last order is indorsed hereon, and is expressly made a part hereof. This certificate is payable one year from date, or sooner, at the option of the receiver, after sixty days' notice published once a week in the *New York Evening Post*, and may be renewed for one year, after maturity, at the discretion of the receiver, but the same shall in no event be renewed more than once, or for any period longer than two years from its issue. The said loan shall be used exclusively by the receiver for the purpose herein stated, and for that purpose shall be kept separate from the other funds of the operating department. The said certificates to be issued only as occasion requires, and to be dated upon the day of their issue, and to be numbered consecutively from one to four hundred, both inclusive, and for that purpose the certificates issued by virtue of the orders aforesaid are limited to four hundred, each of the denomination of one thousand dollars, and are made a first lien upon all the standard gauge property of every name, nature and description pertaining to said railway when so widened, in the hands of the receiver, including road-bed, track and rolling stock, shops, depots, round-houses, and other property in and between Jefferson, in Marion county, and McKinney, in Collin county, Texas, and heretofore known as the East Line and Red River Railroad; and the earnings of said line from Jefferson to McKinney, after deducting operating expenses, floating debt and the expenses of the receivership, are pledged for the payment of the principal and interest of this obligation according to the tenor hereof.

— — —  
As Receiver of the East Line and Red River Railroad.

Copy of interest warrant.

*Void if detached.*

EAST LINE AND RED RIVER RAILROAD.

No. —.

The receiver will pay to the bearer, at the banking house of Poor & Greenough, in the city of New York, thirty dollars — month— from date of the certificate to which this coupon is attached, being six months' interest on certificate No. —.

— — —, As Receiver.

And it is further ordered that the said certificates shall in no case be sold or issued for less than the par or face value thereof in cash or property, and that the said certificates so issued and sold shall equally and alike, and without any preference the one over the other, be and constitute, and they are hereby made, a first lien upon the standard gauge line of railroad, equipment and other property of the said East Line and Red River Railroad Company or pertaining to said railway so widened from Jefferson, in the county of Marion, to McKinney, in the county of Collin, a distance of one hundred and fifty-two (152) miles, more or less, and of the income and revenues thereof, as is in the said certificates fully and specifically declared, in the

possession of the said William M. Giles, or his successor or successors, as receiver, and the lien of said certificates are by consent of parties made superior to the claim and lien heretofore established in favor of H. C. Cross and George A. Eddy, late receivers of the Missouri, Kansas and Texas Railway; and the said receiver is hereby authorized and directed to pay the principal and the interest mentioned in the said certificates at the time and times and in the manner and upon the terms therein specified; and in the case of the failure of the receiver so to pay the same according to the terms thereof, any holder or holders of such certificates may, without application to or leave of this court, prosecute suits or actions in this court or elsewhere, in their own name and for their own benefit, or on behalf of themselves and all others similarly situated, to enforce the lien and compel the payment thereof.

THE STATE OF TEXAS, }  
County of Travis. }

I, James P. Hart, clerk of the district court within and for the county and State aforesaid, do hereby certify that the foregoing contains a true and correct copy of order of court granting receiver power to borrow \$400,000, and to issue certificates therefor, of date April 15, 1892, in Cause No. 8698, of The State of Texas v. The East Line and Red River Railroad Company, as now of record in this office.

In witness whereof I hereto set my hand and official seal, this May 16, 1892.

[SEAL.]

JAS. P. HART,

Clerk District Court, Travis County, Texas.

### *Assignment of Receiver's Certificate.*

[Indorsed on foregoing certificate.]

For value received, — have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto —, the within certificate and all — right, title and interest in, to and under the same, together with the sum or sums of money payable under said certificate and the coupons attached thereto.

Dated —, 189—.

Signed and acknowledged in presence of —, —, —.

### *Another Form of Receiver's Certificate.*

SAMUEL R. MURRAY, RECEIVER.

BOSTON AND SAN FRANCISCO RAILROAD COMPANY.

No. —.

BOSTON, MASS., —, 189—.

This is to certify that there is due to — from Samuel R. Murray, receiver of the Boston and San Francisco Railroad Company (and not from him individually), the sum of — dollars on account of money borrowed by said receiver, pursuant to the order of the circuit court of the United States

in and for the district of Massachusetts, made and entered the — day of —, 1891, for payment of —.

This certificate bears interest upon the principal sum above named at the rate of six per centum per annum until the same is paid, and is transferable by indorsement.

§ —.

Receiver of the Boston and San Francisco Railroad Company.

### *Stock Note.*

§ —.

NEW YORK, — —, 18—

— months after date, for value received, the undersigned hereby promises to pay to the New York Trust Company, or order, — dollars, at said trust company, in gold coin or United States notes or treasury notes, which are a legal tender, having deposited with said trust company as collateral security for the payment of this note, and also as collateral security for all other present or future demands of any and all kind, of the said trust company, against the undersigned, due or not due, the following property, viz., —, and do hereby give full authority to said trust company to sell the whole or any part thereof, or substitutes therefor, or additions thereto, at any brokers' board or at public or private sale, on the non-performance of this promise, or the non-payment of any of the demands aforesaid, and without notice of intention to sell or of the time or place of sale, and without demand of payment of this note or of any of the said demands, and that if, in the opinion of the said trust company or any of its officers, the value of the said collaterals at any time prior to maturity of this note should be less than — dollars, at which they are estimated, the undersigned shall, upon written demand by mail, addressed to the undersigned at New York, N. Y., —, furnish such further security as will be satisfactory to said trust company; and in case of failure so to do within one day after mailing such demand, then the whole or any part or parts of said securities or substitutes or additions may be sold as hereinbefore provided; and in case of any sale or other disposition of any of the securities aforesaid, after deducting all expenses of collection and sale, to apply the residue of the proceeds to pay any or all of said demands in whole or in part, due or not due, including this note, making a rebate of interest upon the demands not due. And the undersigned agree to be liable to the said trust company or other holder hereof for any deficiency; and upon any sale hereunder the said trust company or other holder hereof may purchase the whole or any part of the securities sold.

### *Bondholders' Protective Agreement.*

#### SOUTHERN AND WESTERN RAILROAD COMPANY.

##### BONDHOLDERS' PROTECTIVE AGREEMENT.

Whereas, default has been made by the Southern and Western Railroad Company in the payment of the interest which became due on the 1st day of September, 1892, on the bonds of said company, secured by a mortgage

or deed of trust dated the 1st day of March, 1891, executed by the said company on its railroad and other property to the Western Trust Company of New York, as trustee; and

Whereas, default has been made by the Southern and Western Railroad Company in the payment of the interest which became due on the 1st day of September, 1892, on the Columbus Railroad Company, secured by a mortgage or deed of trust dated the 1st day of September, 1887, executed by the said company on its railroad and other property to the Western Trust Company of New York, as trustee, which said railroad is now a divisional part of the said Southern and Western Railroad; and

Whereas, default has been made by the Southern and Western Railroad Company in the payment of the interest which became due on the 1st day of January, 1893, on the bonds of the Columbus Railroad Company, secured by a mortgage or deed of trust dated the 1st day of January, 1881, executed by the said company on its railroad and other property to the Farmers' Loan and Trust Company of New York, as trustee, which said railroad now forms a divisional part of said Southern and Western Railroad; and

Whereas, default has been made by the Southern and Western Railroad Company in the payment of the interest which became due on the 1st day of January, 1893, on the bonds of the Columbus Railroad Company, secured by a mortgage or deed of trust dated the 1st day of January, 1884, executed by the said company on its railroad and other property to the Farmers' Loan and Trust Company of New York, as trustee, which said railroad now forms a divisional part of the Southern and Western Railroad; and

Whereas, in the litigation now pending for the settlement of the divers equities and accounts of the Central Railroad Company of Georgia, and in any proposed plan of reorganization of said company, it is of the utmost importance to the holders of each class of the bonds aforesaid, based on roads comprising the Southern and Western system, that they should cooperate for their mutual protection and benefit, and should to that end appoint a committee to represent them and each of them:

Now, therefore, we, the undersigned, who are respectively holders of the amounts and the classes of bonds specified opposite our names respectively hereunto subscribed, in consideration of the advantages which will result to us respectively from concert of action in protecting our interests in enforcing the said securities for the payment of the said bonds, or otherwise securing proper consideration for our respective securities, and of other good causes and considerations, do hereby, each for himself, and not the one for the other, or either of the others, agree with each other and with the committee hereinafter mentioned, as follows, that is to say:

*First.*— We hereby agree to deposit with the Western Trust Company of New York, or [or, and] Martin's Bank, London, England, the number of bonds of the above companies specified opposite our names respectively, with the unpaid coupons due thereon (or any trust company or bankers' certificates previously issued to us or either of us under any agreement or reorganization, such certificates to be duly indorsed to the committee hereby appointed, so that the bonds deposited therefor may, on return of said certificates, be deposited with the committee authorized under the terms of this agreement), which are to be held by said Western Trust Company of

New York, and said Martin's Bank, London, England, subject to the order of Simon Borg, R. C. Martin, H. E. Garth, F. L. Lehmann, Edwin S. Hooley and Joseph M. Lichtenauer, as the committee of the bondholders; and that in order to facilitate the proceedings under this agreement, so that no separate action in relation thereto shall be taken by either of us, the said committee appointed in our behalf, they and their successors, are hereby authorized and empowered as our attorneys and in our names, or in the names of said committee, or any person or persons authorized or employed by them, to intervene in any existing litigation, commence such actions, employ such persons, take such proceedings, give such directions, execute such papers, and do such acts under the said mortgages or deeds of trust, or otherwise, as they consider judicious and proper in order to bring about an enforcement of said securities and the payment of the principal and interest of said bonds held by us respectively, or so much thereof as may be collectible, or to take such other proceedings as they deem necessary or proper to secure for us an adjustment of all claims against such railroad companies satisfactory to said committee, or a majority of them. And said committee is hereby further authorized and empowered to negotiate with any committee undertaking the reorganization of the Central Railroad Company of Georgia, for a participation in said reorganization upon such terms as they may be able to secure, or said committee may itself formulate a plan for the reorganization of the roads comprising the Southern and Western system, either alone or in connection with other roads, if deemed by said committee necessary or advisable; but no participation in any plan of reorganization formulated by others, and no plan of reorganization formulated by the committee, shall become binding upon any of the subscribers hereto until such plan shall have been approved of by sixty per cent. in amount of each class of said bonds so deposited at a regularly called meeting, as hereinafter provided.

*Second.*— That in case of a sale of the mortgaged premises under the said mortgages or deeds of trust, the said committee shall be, and are hereby, authorized and empowered to purchase the same for our account and benefit, respectively, according to the amount of said bonds held by us, respectively, at such price (not, however, exceeding the aggregate amount of the principal and interest at the time being due or unpaid upon all of the bonds secured by the said mortgages or deeds of trust), and expense of foreclosure, as they may consider judicious, and to make any arrangement that may be necessary to accomplish such purpose that shall not involve the compulsory assessment of the subscribing bondholders, and to use said bonds and unpaid coupons in making such purchase.

And that the said bonds held by us, respectively, and the coupons belonging thereto, may be also held by the said committee for the purpose of being used by them in or about the completion of such purchase, or (in case other persons than themselves should become the purchasers of the said mortgaged premises) for the purpose of realizing in our behalf, respectively, our respective proportions of the proceeds of such sale to which, as holders of the said bonds, we may be entitled, the said bonds and coupons which are now or may be hereafter deposited in the Western Trust Company of New York, and Martin's Bank, London, England, shall be held by them until the

time of such sale of said roads or payment of said bonds, or until delivered by them or either of them to the said committee on its request so to do.

*Third.*— That if the said committee should purchase the mortgaged premises prior to the approval of a plan of reorganization by the bondholders as hereinbefore provided, the same may be conveyed to them, and they may take possession of the same for the account and benefit of ourselves respectively, or of our respective representatives or assigns, according to the amount of said bonds then held by us or them respectively, and that said committee shall thereupon, without any unnecessary delay, call a general meeting of the subscribers hereto, their representatives or assigns, for the purpose of making a disposition of the said mortgaged premises, which disposition shall either be by placing the same under a new corporate organization to be composed of ourselves, of our representatives or assigns, and in which we or they shall be respectively interested, *pro rata* equally, according to the amount of said bonds held by us or them respectively in the several properties, preserving, however, as near as may be, the priorities of the several issues of bonds, or by reselling or otherwise disposing of the same for the account and benefit of ourselves, our representatives or assigns, as may be determined by a vote of sixty per cent. in interest of each class of bonds so deposited under this agreement, of such of us or them as shall attend such meetings or be represented at the same by proxy; *provided, however*, that at least five days' notice of the time and place of such meeting shall be given by a notice through the postoffice (postage prepaid), addressed to us at our respective places of address, as specified opposite to our signatures hereto subscribed (or addressed to our respective representatives or assigns at their places of address, if their names and places of address shall have been furnished in writing to the said committee before the necessity of giving such notice arises), and also by advertisement in two or more of the daily newspapers published in the city of New York, and a newspaper published in London, England.

*Fourth.*— That if, during the continuance of this agreement, an opportunity should arise in any manner other than herein specifically provided for making an arrangement or settlement of our respective claims under the said bonds, upon terms which the said committee shall consider advisable, they are authorized to make such arrangement or settlement accordingly; subject, however, to the rights of any party hereto who may dissent therefrom to withdraw his said bonds on surrender of the negotiable certificate issued therefor within a time to be then fixed by said committee and upon payment of a *pro rata* portion of the expenses theretofore incurred.

*Fifth.*— For the purposes of this agreement, we hereby give and grant unto our said committee and their successors full power and authority to do and perform all and every act and thing requisite and necessary to be done in and about the premises, as fully to all intents and purposes as we might or could do if personally present, hereby ratifying and confirming all that our said committee shall lawfully do or cause to be done by virtue hereof; and said bonds so deposited shall stand pledged, *pro rata*, to the extent of not exceeding ten dollars per bond for the expenses of said committee and the advances the said committee may find necessary to secure for the purpose of carrying into effect this agreement; all expenses, however, to be

charged *pro rata* upon the bonds deposited. In case any reorganization of the constituent parties is effected, either through the sale of the property or through a participation in any plan for the reorganization of the Central Railroad Company of Georgia, or other companies, proper and reasonable remuneration for the committee and its counsel shall be reserved out of the proceeds of sale or the new securities received by it. It is understood that a majority of the committee has the power to increase its number, or, in case of a vacancy, such vacancy may be filled by a majority of the other members of the committee, such successor or such additional members having the same power under this agreement as if originally named herein.

*Sixth.*—That if during the continuance of this agreement any question not herein provided for should arise in relation to any matter growing out of the duties hereby devolved upon the said committee, it shall be determined by a vote of a majority of the committee.

*Seventh.*—That all the general meetings of the parties in interest under this agreement to consider and determine any of the matters herein provided for may be called by the chairman or a majority of the members of the said committee; that notice of the same shall be given as provided in the preceding third section, and that in the determination of any question arising at such meetings, the votes of sixty per centum in interest of each class of bonds of such of the subscribers hereto, or their representatives or assigns, as shall attend at such meetings, or be represented at the same by proxy, shall prevail.

*Eighth.*—It is further understood and agreed that any deposit of bonds under this agreement with either the said Western Trust Company of New York, or Martin's Bank, London, England, shall bind the parties so depositing said bonds to all the provisions of this agreement as fully as if it had been subscribed; but it is understood and agreed that said committee are not to be under any obligation, expressed or implied, to any bondholder who shall not subscribe this agreement or deposit his bonds with the said Western Trust Company of New York, or Martin's Bank, London, England.

*Ninth.*—The committee may limit the time within which they will receive bonds and fix different terms upon which they will receive any tender thereof; and reserve the right, if, in their judgment, a sufficient number of bonds are not deposited, to declare this agreement inoperative and authorize the return of the bonds upon the surrender of the certificates.

*Tenth.*—It is understood that all copies of this agreement which shall be subscribed by any of the holders of said bonds and delivered to the said committee shall have the like effect as if their signatures were hereunto subscribed.

*Eleventh.*—It is further understood and agreed that the act of a majority of the committee, at any meeting duly called, shall be considered the act of the whole committee, but no member of the committee shall be individually pecuniarily liable, nor liable for the acts of any other member, or for anything but his own wilful misconduct.

*Twelfth.*—It is understood that the trust company is to issue negotiable certificates for each one thousand dollar bond and the coupons so deposited with them. Each certificate shall be negotiable, subject to the terms of this



agreement, but no notice of any meeting shall be required to be given to any person whose address is not lodged with the committee.

In witness whereof, we have hereunto set our hands and seals this — day of —, 1898, the seal of one to be the seal of all.

SUBSCRIBERS.	ADDRESS.	SOUTHERN AND WESTERN.	AMOUNT OF BONDS.		
			Chattanooga, Rome and Columbus.	Columbus and Western.	Columbus and Rome.
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....

### *Proxy.*

*Know All Men by These Presents:*

That — do hereby constitute and appoint Walter S. Judd, Francis Bissell and Elbert P. Roberts, or any two of them who may be present at said meeting, with power to each of substitution, — attorneys and agents for — and in — name, place and stead, to vote as — proxy at the annual meeting of the stockholders of the A., B. and C. Railway Company, to be held at Parsons, Kansas, on the 1st day of May, 1894, at 12 o'clock M., for the election of directors, and upon any matter that may come before the said annual meeting or any adjournment thereof, according to the number of votes — should be entitled to vote if then personally present at the said meeting.

In witness whereof — have hereunto set — hand and seal this — day of —, 1894. — —, [SEAL.]

Scaled and delivered in presence of — —,

### *Substitution of Proxy.*

Whereas, certain person, firms and corporations in whose name sundry shares of the stock of the A., B. and C. Railway Company stand and are registered on the books of the said company, and who are stockholders of the said company, and who are entitled to vote upon the said stock, have, by proxies duly executed and delivered, constituted and appointed me, Walter S. Judd, their agent and attorney for them and in their name, place and stead to vote, as their proxy, at the annual meeting of the stockholders of the said A., B. and C. Railway Company, to be held at Parsons, in the State of Kansas, on the 1st day of May, 1894, at 12 o'clock M., for the election of directors, and upon any matter that may come before the said annual meeting or any adjournment thereof, according to the number of

votes they would be entitled to vote if then personally present at the said meeting; and

Whereas, by the said proxies, power of substitution is conferred upon me:

Now, therefore, in consideration of the premises, I, Walter S. Judd, hereby designate and appoint Elbert P. Roberts the substituted agent and attorney in my place and stead, upon due presentation of the proxies as aforesaid, to vote upon the said stock to the full number of votes I should be entitled to vote under and by virtue of the said proxies if then and there personally present, and to act for such constituents and me in all respects, under and by virtue of the said proxies, as they or I should be entitled to do and act if then and there personally present; and I do hereby ratify and confirm all of the acts of the said Elbert P. Roberts done pursuant to and in accordance with the provisions of the said proxies and this instrument of substitution as fully as though performed and done by me if then and there personally present.

In witness whereof I have hereunto set my hand and affixed my seal at the city of New York, this 1st day of April, 1894.

— ——. [SEAL.]

Signed, sealed and delivered in the presence of — ——.

### *Bill for Account and Injunction in Patent Case.*

#### CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

THE WEBSTER LOOM COMPANY	}	IN EQUITY.
vs.		
ELIAS S. HIGGINS, HENRY M. BROOKS		
and EUGENE HIGGINS, doing business under the name and style of ELIAS S. HIGGINS & Co.		

*To the Honorable the Judges of the Circuit Court of the United States in and for the Southern District of New York:*

The Webster Loom Company, a corporation organized under and pursuant to the laws of the State of New York, and having its principal place of business in the city of New York, and being a resident of the city of New York within the meaning of the statute defining the jurisdiction of this court, brings this its bill of complaint against Elias S. Higgins, Henry M. Brooks and Eugene Higgins, all residents of the city and State of New York, and citizens of said State, and doing business under the name and style of Elias S. Higgins & Company.

And thereupon, your orator complains and says that heretofore and before the 27th day of August, 1872, one William Webster, then of Morrisania, in the State of New York, was the original and first inventor of a certain new and useful improvement in looms for weaving pile fabrics, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application for a patent therefor.

And your orator further shows unto your honors that the said William Webster, so being the inventor of said improvement, made application to the commissioner of patents, in accordance with the then existing laws of the United States, and complied in all respects with the conditions and requirements of said laws.

And thereafter, on the 27th day of August, 1872, letters patent of the United States numbered No. 130,961, signed, sealed and executed in due form of law, and bearing date the day and year last aforesaid, were issued to said William Webster, whereby there was secured to him and to his heirs and assigns for the term of seventeen years from the 27th day of August, 1872, the full and exclusive right of making, using and vending the said improvement throughout the United States and the Territories thereof, as by a certified copy of said letters patent, in court to be produced, will more fully appear.

And your orator further shows that by an instrument in writing, bearing date the 1st day of October, 1872, the said William Webster duly assigned, transferred and set over unto himself, jointly with Cornelius M. Meserole and William G. Smith, all his, the said Webster's, right, title and interest in and to said letters patent and the invention thereby secured, which said assignment was duly recorded on the — day of —, 18—, in the patent office of the United States, in liber —, as by said agreement, with the certificate of recording thereto affixed, or a duly certified copy of said assignment, in court to be produced, will more fully and at large appear.

And your orator further shows that by an instrument in writing, bearing date the 20th day of October, 1873, the said Webster, Meserole and Smith duly assigned, transferred and set over to your orator all their and each of their right, title and interest in and to said letters patent and the invention thereby secured, which said assignment was duly recorded on the — day of —, 18—, in the patent office of the United States, in liber —, as by said assignment, with the certificate of recording thereto affixed, or a duly certified copy of said assignment, in court to be produced, will more fully and at large appear.

And your orator further shows that thereafter, to wit, on or about the 26th day of May, 1874, the said Webster individually, and the said Webster, Meserole and Smith, sold, assigned, transferred and set over unto your orator all and every right and cause of action which they, the said Webster, Meserole and Smith, might have, jointly or severally, against any person, firm or corporation arising out of the infringement of the said letters patent, and your orator by means of said assignments became vested with the right to recover such damages and profits as the said Webster, Meserole and Smith were jointly or severally entitled to recover since the said date of the said patent and prior to the assignment thereof by the said Webster, Meserole and Smith to your orator on or about the 20th day of October, 1873.

And your orator further shows that by virtue of the assignments aforesaid your orator became and now is the sole and exclusive owner of said letters patent and of the invention and improvement therein described and claimed and of all rights secured by said letters patent since the date thereof, and is entitled to be protected in the enjoyment of the same.

And your orator further shows, upon information and belief, that prior to the assignment of the said letters patent to your orator, the said Webster,

Meserole and Smith recovered a decree upon said letters patent in a suit in the circuit court of the United States for the district of New Jersey against the New Brunswick Carpet Company; and also commenced a suit upon said letters patent in the circuit court of the United States for the district of Massachusetts against the firm of Gilbert and Taft, by whom the looms used by the New Brunswick Carpet Company were constructed at Worcester, Massachusetts, and in which said last-named suit the defendants by their counsel consented to a decree restraining the construction of further looms of the kind made and sold by the said Gilbert and Taft to the New Brunswick Carpet Company; and on the 27th day of April, 1874, recovered a decree upon said letters patent against one John Cochrane, Jr., in the circuit court of the United States for the district of Massachusetts, who was also using looms constructed by the said Gilbert and Taft. That on or about the 1st day of June, 1874, a suit was commenced in the circuit court of the United States for the southern district of New York, against Elias S. Higgins and Nathaniel D. Higgins, for the infringement of said letters patent. That at the October term of said court in the year 1878, a decision was rendered in said suit by the Honorable Hoyt H. Wheeler, denying the relief prayed for in said suit and directing that a decree be entered dismissing the bill of complaint with costs.

That said decree was duly entered and an appeal was duly taken to the Supreme Court of the United States.

That said cause came on to be heard at the October term of said Supreme Court in the year 1881, and a decision was rendered sustaining the validity of said letters patent and adjudging the infringement of said letters patent by the said defendants Elias S. Higgins and Nathaniel D. Higgins, and directing that the decree of the said circuit court be reversed and the cause remanded with instructions to enter a decree in favor of the complainants and to take such further proceedings as law and justice might require.

That thereafter a decree against said defendants was duly entered in said circuit court for the southern district of New York in conformity with the mandate of the said Supreme Court.

All which matters and things will more fully and at large appear by reference to said decisions and decrees, or duly authenticated copies thereof here in court to be produced, to which your orator craves leave to refer.

And your orator further shows that but for the infringement herein complained of, and others of like character, your orator would still be in the undisturbed possession, use and enjoyment of the exclusive privilege secured by the said letters patent, and in receipt of the profits of the same.

And your orator further shows unto your honors, as it is informed and believes, that since the date of said letters patent the defendants herein named, well knowing all the facts hereinbefore set forth, and against the will of your orator, and in violation of your orator's rights, have been and are now jointly infringing said letters patent within the district aforesaid, and elsewhere in the United States, by constructing or causing to be constructed, and by using and causing to be used, looms for weaving pile fabrics, each of which contains the invention described and claimed in the said letters patent, all which acts and doings are contrary to equity and good conscience, and tend to the manifest injury of your orator in the premises.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And that the defendant may be decreed to account for and pay over the income or profits thus unlawfully derived from the violation of your orator's rights, and be restrained from any further violation of said rights, your orator prays that your honors may grant a writ of injunction, issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said defendants, their clerks, attorneys, agents, servants and workmen, from any further construction, sale or use in any manner of said patented improvement, or any part thereof, in violation of your orator's rights as aforesaid, and that the material now in possession or use of the said defendants may be destroyed or delivered up to your orator for that purpose.

And that your honors, upon the rendering of the decree above prayed, may assess or cause to be assessed, in addition to the profits to be accounted for by the defendants as aforesaid, the damages your orator has sustained by reason of such infringement, and that your honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment under the circumstances of the wilful and unjust infringement by said defendant as herein set forth.

And your orator further prays that a provisional or preliminary injunction be issued restraining the said defendants from any further infringement of said letters patent pending this cause, and for such other and further relief as the equity of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said Elias S. Higgins, Henry M. Brooks and Eugene Higgins, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

BROWN & JONES,

Solicitors for Complainant and of Counsel.

WEBSTER LOOM COMPANY,

By WM. G. SMITH, President.

UNITED STATES OF AMERICA, } ss.  
Southern District of New York, }

On this 19th day of August, 1889, before me personally appeared Wm. G. Smith, the president of the Webster Loom Company, the complainant above named, who, being by me duly affirmed, deposes and says that he is the president of the Webster Loom Company and familiar with its business, and that he has read the foregoing bill of complaint and knows the

contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

WM. G. SMITH.

Affirmed and subscribed before me this 19th day of August, 1889.

[SEAL.] ANTHONY GREG,

Notary Public, Kings County.

Certificate filed in New York county.

### *Bill Against an Agent for Mismanagement.*

*To the Judges of the Circuit Court of the United States for the District of Massachusetts:*

W. D., the younger, of the city, county and State of New York, merchant and a citizen of said State, brings this his bill against N. W., the younger, and A. S., merchants and copartners doing business in B., in the State of Massachusetts, under the firm of N. W., Junior, & Company, and citizens of the State of Massachusetts.

And thereupon your orator complains and says that in the month of January, A. D. 1886, he was the owner of a certain ship or vessel called the *Mastiff*, then lying in the port of B., bound on a voyage to S. F., in the State of California, and that being desirous to procure a cargo of goods and merchandise to be carried to said S. F., in said vessel on freight, he applied to said W. & S., who were engaged in that line of business, to obtain a cargo for said vessel on freight, and, as a compensation for their services in so doing, agreed to pay them a commission of five per centum on the amount of the freight and primage of such goods and merchandise as they should procure to be shipped on board of the said ship, in consideration of which they agreed to act as his agents in the premises, and to make use of their knowledge, skill and ability to procure a full cargo for said vessel on freight,—and that accordingly the lading and procurement of freight were intrusted to them, and in said month of January, and the ensuing months of February and March, they did procure a cargo for said vessel, and in the month of March she set sail and departed on her voyage for said S. F.

That on or about the 17th day of said March said W. & S. sent to your orator a freight list, or statement of the amount of merchandise laden on board of the said vessel, and of the rates of freight thereof, and of the sums of money to be earned and paid on the carriage and delivery thereof at said port of S. F. (which said freight list your orator prays leave to file in court as a part of this bill); by which it appears that all the merchandise laden on board of the said ship was shipped at specific rates of freight therein set down, and that the total amount of freight, including primage, was the sum of twenty thousand and one dollars and twenty cents, upon which sum the said W. & S. claimed of your orator, and he paid to them, a commission of five per centum, amounting to the sum of one thousand and five dollars

and six cents, together with other charges for advertising, and so forth, as by their bill herewith also filed, in the full belief, and relying on the assurance of the said W. & S., made by sending him the said freight list and otherwise, that the merchandise therein mentioned had been actually laden on board of the said vessel, to be carried and delivered at and for the rates of freight therein specified.

That the said ship was consigned to certain persons doing business at said S. F., under the firm of C. & D., who, upon the arrival of said vessel in the month of —, 1856, attended to the unlading and discharge of the cargo, the collection of the freight and the remittance thereof to your orator. That upon such discharge and delivery, it appeared that fifty-seven  $\frac{11}{16}$  tons of pig-iron, which in the said freight list were specified as shipped at the rate of ten dollars per ton, and the freight of which was therein stated to amount to five hundred and seventy-seven  $\frac{1}{16}$  dollars, and one hundred and thirty-three nests tubs, two hundred nests tubs, and seventy-five dozen pails, which in said freight list were specified as shipped at and for the freight or compensation of five hundred and ten dollars, were not shipped at such rates of freight, but the rate of freight specified therefor in the bills of lading thereof (which were not signed by the master of said ship, but by the said W. & S., who assumed to act as his agents in that behalf without his knowledge or consent) was "*one-half net profits over costs and charges*;" that the said iron, tubs and pails, as your orator is informed and alleges, could not be sold at any profit, and that the said C. & D. did not collect, and your orator has not received, any freight or compensation for the carriage and delivery thereof at said S. F.

That upon receiving information from the said C. & D. of the fact that said iron, tubs and pails were shipped on half profits instead of the rates of freight stated in said freight list, your orator immediately advised the said W. & S. that he held them responsible for the amount of freight at which they had represented that the same were shipped, and upon which they had charged and been paid their full commission, and requested payment thereof, which they refused to make.

That the commission, agency and trust, for which your orator retained said W. & S., was to procure a cargo for said vessel to be carried and delivered on payment of freight in money at specified rates, and not upon half profits; that the said W. & S. represented to your orator that they had obtained and shipped a cargo, upon the delivery of which your orator would be entitled to receive the sums of money as freight therefor specified in the said freight list; that said W. & S. demanded of your orator a commission on the amount thereof, as so shipped, and that your orator paid them said commission, in the full belief and relying upon their assurance, contained in said freight list, that the various articles therein mentioned were shipped at the rates of freight therein specified, and that upon the safe delivery thereof your orator would be entitled to receive the same in money.

That the said iron, tubs and pails were safely carried to S. F. and delivered to the consignees thereof, and that upon such delivery your orator had earned and was entitled to be paid for such service the rates of freight and sums of money specified in the said freight list, the same being the

usual and current rates of freight, upon the amounts of which, as such, the said W. & S. charged their commissions as aforesaid; that by reason of their undertaking to carry and deliver the same upon half profits instead of on freight, your orator has lost the sums of money to which he should have been entitled and to which the said W. & S. represented that he would be entitled on the delivery thereof, and has not received and is not entitled to claim, by reason of their said doings, any compensation from the owners or consignees of the said goods and merchandise for the cost and expense of their transportation and delivery; and that by reason of the premises, and of the representation made that the said goods and merchandise were shipped at the rates of freight specified in the said freight list, the said W. & S. are bound to make good the loss your orator has suffered by their said doings, and to pay to him the sums of money which he would have received if the said goods and merchandise had been shipped at the rates specified in said freight list, and your orator has repeatedly requested them so to do.

But now, so it is, may it please your honors, that the said W. & S. absolutely refuse to comply with such request.

To the end, therefore, that they, the said W. & S., may be decreed to pay to your orator the said sums of two thousand and seventy-seven dollars\* and five hundred and ten dollars, and such losses, damages and interest as your orator has suffered by reason of the premises, and that your orator may have such other relief as the nature of his case may require, and that the said W. & S. may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several corporal oaths, and to the best of their knowledge and belief, make answer to all and singular the premises.

May it please your honors to grant unto your orator a writ of subpoena, directed to the said N. W., the younger, and A. S., commanding them at a suitable time and place to appear before your honors to make answer to the premises, and to abide by and perform such order and decree as to your honors shall seem meet.

F. C. L., Solicitor.

\*Limit of jurisdiction, U. S. Circuit Court, \$2,000.



*Affidavit of No Collusion in Bill of Interpleader.*IN CHANCERY [*or* EQUITY].

Between J. C., Plaintiff, }  
                                   and }  
       —, Defendants. }

The said J. C. maketh oath and saith that he has exhibited his bill of interpleader against the defendants in this cause without any fraud or collusion between him and the said defendants, or any or either of them; and that the said J. C. hath not exhibited his said bill at the request of the said defendants, or of any or of either of them, and that he is not indemnified by the said defendants, or by any or either of them, and saith that he hath exhibited his said bill with no other intent but to avoid being sued or molested by the said defendants, who are proceeding, or threaten to proceed, at law against him for the recovery of the rent of the said —, in the bill mentioned.

Sworn, etc.

J. C.

*Bill to Restrain the Infringement of Patent.*

IN EQUITY.

*To the Judges of the Circuit Court of the United States for the District of Massachusetts:*

E. H., Jr., of B., in the State of New York, and a citizen of the State of New York, brings this his bill against C. W., of B., in the State of Massachusetts, and a citizen of the State of Massachusetts.

And thereupon your orator complains and says that he, being the original and first inventor of a new and useful improvement in sewing machines, fully described in the letters patent issued to him therefor, as hereinafter stated, and not known or used by others before his invention thereof, and not at the time of his application for letters patent therefor in public use or on sale with his consent or allowance as the inventor; and being a citizen of the United States, and having made due application, and having fully and in all respects complied with all the requisitions of the law in that behalf, did obtain letters patent therefor, issued in due form of law to him in the name of the United States, and under the seal of the patent office of the United States, and signed by N. P. T., acting secretary of state, and countersigned by H. H. S., acting commissioner of patents, bearing date the 10th day of September, in the year of our Lord 1846, whereby was granted and secured, according to law, to your orator, his heirs, administrators or assigns, for the term of fourteen years from said date, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement in sewing machines therein specified and claimed, as in and by said letters patent, or a certified copy thereof, here in court to be produced, will more fully appear.

And your orator further shows unto your honors that certain assignments of certain rights in said patent have been made and duly recorded in the

patent office of the United States, whereby your orator, prior to the infringements herein complained of, became and now is the sole owner of said patent, as in and by said assignments, or certified copies thereof, here in court to be produced, will more fully appear.

And your orator further shows unto your honors that the said improvement in sewing machines, patented to him as aforesaid, has hitherto been in the exclusive possession of your orator or his grantees; and has hitherto been and still is of great value and profit to your orator; and that a license fee or patent rent, under his said patent, has hitherto been and still is paid to your orator for the largest portion of all the sewing machines manufactured and sold in the United States; yet the said defendant, well knowing the promises, but contriving how to injure your orator, and without his consent or allowance, and without right, and in violation of said letters patent and your orator's exclusive rights, secured to him aforesaid, has made, used, or vended, and still does make, use, or vend to others to be used in said district and in other parts of the United States, a large number of sewing machines, but how many your orator cannot state, but prays that the defendant may discover and set forth each, embracing substantially the improvement in sewing machines, or a material part thereof, patented to your orator as aforesaid, and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe upon the exclusive rights and privileges intended to be secured to your orator in and by his said letters patent.

And your orator further shows unto your honors that heretofore the validity of his said patent has been uniformly affirmed after severe and repeated contestation; namely, by a verdict and judgment thereon at law, in 1852, and by six final decrees in equity in the circuit court of the United States for the district of Massachusetts, and by one final decree in equity in the circuit court of the United States for the southern district of New York, all obtained in favor of said patent prior to August, 1854.

And your orator further shows unto your honors that the sewing machines made and sold by the defendant, as herein complained of, are, in their essential parts and character, substantially like the sewing machines against which injunctions were obtained in the suits aforesaid by your orator, or by your orator and his then co-owner of said patent.

And your orator has requested the said defendant to desist from making, using, or vending to others to be used, the said sewing machines, embracing the said improvement patented to your orator, and to account with and pay over to your orator the profits made by said defendant by reason of the unlawful making, using or vending of said sewing machines embracing said patented improvement of your orator. But now, so it is, may it please your honors, that said defendant has combined and confederated with other persons, to your orator unknown, but whom, when discovered, your orator prays leave to make defendants hereto, to resist and destroy the exclusive rights and privileges secured to your orator as aforesaid, and to make, use and vend said improvement in sewing machines, patented to your orator as aforesaid, without the license of your orator, and in violation of his just rights in the premises, all of which is contrary to equity and good conscience.

To the end, therefore, that the said defendant may, if he can, shew why your orator should not have the relief herein prayed, and may, under oath, and according to his best and utmost knowledge, remembrance, information or belief, full, true, direct and perfect answer make to all and singular the premises, and more especially may answer, discover and set forth whether during any and what period of time, and where, he has made, used, and vended to others to be used, for any and what consideration, any, and how many, sewing machines, and whether or not the same embraced the said improvement in sewing machines, or any substantial part thereof, patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using or vending of sewing machines embracing said improvement patented to and vested in your orator as aforesaid, and may be restrained by an injunction to be issued out of this honorable court, or by one of your honors, according to law in such case provided, from making, using or vending any sewing machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines, now in the possession or under the control of the defendant, may be delivered up to your orator or be destroyed; and for such further and other relief in the premises as the nature of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orator, not only a writ or writs of injunction, conformable to the prayer of this bill, but also a writ or writs of subpoena to be directed to the said C. W. and confederates, when discovered, commanding him and them, at a certain time, and under a certain penalty, therein to be limited, personally to be and appear before your honors in this honorable court, then and there to answer unto this bill of complaint, and to do and receive what to your honors shall seem meet in the premises.

E. H., JR.

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### *Another Bill to Restrain Infringement of Patent.*

*To the Judges of the Circuit Court of the United States for the District of Massachusetts:*

C. G., of N. H., in the State of Connecticut, and the Union India Rubber Company, a corporation duly established by the laws of the State of New York, bring this their bill of complaint against the Beverly Rubber Company, a corporation duly established by the laws of Massachusetts.

And thereupon your orators complain and say that before the 15th day of June, 1844, the said C. G. became and was the first and original inventor of a certain "new and useful improvement in India-rubber fabrics," which your orators verily believe had not been known or used before his invention thereof, and which was not at the time of his application for a patent therefor in public use or on sale with his consent or allowance; and being such first and original inventor, and being desirous of obtaining an exclusive property in the invention by him made, the said C. G. made application in

writing to the commissioner of patents, expressing such desire, and delivered a written description of his invention or discovery, and a specification of improvement by him claimed; whereupon such proceedings were had, that on the 15th day of June, 1844, letters patent of the United States, entitled for "a new and useful improvement in India-rubber fabrics," signed by J. C. C., secretary of state, and countersigned and sealed with the seal of the patent office, by H. L. E., commissioner of patents, were issued to your orator in due form of law, granting to your orator, C. G., his heirs, administrators or assigns, for the term of fourteen years from the day of the date thereof, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof was annexed to the said letters patent.

And your orators further show that afterwards the said C. G. surrendered the said last-mentioned letters patent to the commissioner of patents in due form of law, and such proceedings were had that said commissioner did, on the 25th day of December, 1849, reissue to said C. G. letters patent of the United States, entitled for a new and useful "improvement in processes for the manufacture of India-rubber," signed by T. E., secretary of state, and countersigned and sealed with the seal of the patent office, by T. E., commissioner of patents, whereupon there was granted to your orator, said C. G., his heirs, administrators and assigns, for the term of fourteen years from the 15th day of June, 1844 (being the date of the said surrendered letters patent), the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof was annexed to said reissued letters patent, as by reference to the same, or to a true copy thereof hereunto annexed, and making a part of this your orator's bill of complaint, will more fully and at large appear.

And your orators further show that soon after the granting of the said original letters patent, one H. H. D. commenced infringing the same, and that various suits were brought against him by your orator, C. G., at law and in equity.

A suit was also commenced by your orator, C. G., against E. S. and J. B. K., the agents of said H. H. D., for infringing said patent, in the circuit court of the United States for the district of Massachusetts, in the year 1845; and said H. H. D. and his said agents, E. S. and J. B. K., by their pleas, answers and notices, denied that your orator C. G. was the first and original inventor of the improvement described and claimed in said patent of June 15, 1844, and also denied that said patent was of any validity, for the reasons in said pleas, notices and answers set forth, upon which allegations the parties were at issue, that said suits were pending in said court till the fall of 1846, and for the trial of which preparation had been made on both sides.

And your orators further show that said suits were settled upon the application of said H. H. D., and a written agreement was executed between said H. H. D. and your orator C. G., whereby said H. H. D. agreed, among other things, to pay five thousand dollars for said settlement, and for a license to manufacture certain articles under said patent and other patents of your orator C. G., and to pay a tariff therefor, and covenanted not to in-

fringe said patent; and said H. H. D. then and thereby acquiesced in your orator's (said C. G.'s) rights, and acknowledged the validity of said patents, and said sum of five thousand dollars was paid by said H. H. D., and said suits were discontinued, except the said suit against E. S. and J. B. K., agents of said H. H. D., in which a verdict was taken and judgment entered up against them in favor of your orator C. G., and satisfied as agreed between your orator (said C. G.) and said H. H. D., as by the record thereof now produced here in court will fully appear; and your orators further show that soon after said settlement and the discontinuance of said suit, said H. H. D. recommenced his infringement of said patent; whereupon your orator C. G., about the 1st day of November, 1850, filed his bill against the said H. H. D. in the circuit court of the United States for the district of New Jersey, setting out the letters patent and the infringement thereof, praying an injunction and account against the said H. H. D.; to which bill of complaint the said H. H. D. filed his answer, denying the validity of the said letters patent and setting up that some other persons than your orator C. G. were the inventors of the things patented by him, and that the said reissue to your orator C. G. was fraudulent and void, and that your orator C. G. had no title by reason thereof in his said invention; and issue being joined thereon the parties proceeded to proofs, which were taken at great length and for a long time.

And your orators further show that, the proofs in said cause being taken, the cause was brought to final hearing on its merits at the March term of the circuit court of the United States for the district of New Jersey in the year 1852, before Justices G. and D., and by them held under advisement until the September term then next following, when the judgment of the court was pronounced and opinions delivered, copies whereof are hereunto annexed. And the said court then decided that both the said letters patent were valid in law, and that your orator C. G. was the inventor of the improvement patented, as aforesaid, by your orator C. G., and referred to in said bill of complaint; that the said reissued letters patent were lawfully reissued, and by a decree pronounced in said cause perpetually enjoined the said H. H. D. from making, constructing, using, or vending to others to be used, the said improvements, and ordered an account to be taken of the damages due your orator C. G. by reason of the infringements of said H. H. D. already committed; as by reference to a true copy of the judgment of the court, or to the record of proceedings therein, ready to be produced, will more fully and at large appear.

And your orators further show that, from the granting of the said letters patent until the hearing of the said cause against H. H. D., said C. G. had and enjoyed an exclusive possession and use of the said improvements, by himself and his licensees, except so far as the same were disturbed by said H. H. D., and those combined and confederated with him, and by a few other persons who from time to time began to violate his rights, but who uniformly acquiesced in them and submitted to pay tariffs for their future enjoyment when they became acquainted with your orator's (said C. G.'s) rights secured by his patent, so far as your orators have been informed and believe.

And your orators further show that the annexed schedule, marked A, is

a correct copy of the original letters patent aforesaid; the annexed schedule, marked B, is a correct copy of the letters of reissue aforesaid; and the annexed schedule, marked C, contains true copies of the opinions delivered as aforesaid by the judges of the circuit court of the United States for the district of New Jersey.

And your orators further show that, on the 15th day of June, A. D. 1858, the Honorable J. H., commissioner of patents of the United States, did, as such commissioner, duly grant to said C. G. an extension of said letters patent of June 15, 1844, as reissued December 25, 1849, for a further term of seven years from the said 15th day of June, A. D. 1858, and that the certificate and award of such extension were, by the said commissioner, duly indorsed on the letters patent of which extension was so granted.

And your orators further show that, before the said extension, the said Union India Rubber Company held, under certain agreements, rights from said C. G. authorizing them to make various articles of India-rubber according to his process, so as aforesaid patented, and giving them the exclusive right to make clothing according to that process. That on the 23d day of April, A. D. 1858, and afterwards, on the 8d day of July, A. D. 1858, said C. G., for a valuable consideration, executed and delivered to the said Union India Rubber Company certain agreements continuing such rights. That all the agreements aforesaid are in full force, and true copies of them are hereunto annexed, those first mentioned being marked as Exhibit D, and the two last-mentioned agreements being marked Exhibit E.

And your orators further show that the said Union India Rubber Company, before said extension, were and ever since have been, and now are, engaged under said agreement in the business of making and selling India-rubber goods of various kinds, including clothing, which are made under the aforesaid several agreements according to said process of C. G., patented as aforesaid.

And your orators further show that amongst all persons engaged in the manufacture of India-rubber within the United States, the term or phrase "Vulcanized Rubber Goods" is used and is understood by the defendants and other persons in said business to mean the fabric or product made according to said C. G.'s process, patented as aforesaid, and is so used and understood as the designation of all goods made of a compound of India-rubber in the original composition, whereof sulphur was present in any form or degree; such compound being in that state subjected to the action of artificial heat, so as to produce the chemical or other changes or effects described in said C. G.'s original and reissued letters patent and the specifications thereto annexed. And your orators employ such phrase in this bill of complaint in the sense so explained.

And your orators further show that, as they have been informed and believe, the said defendants, not only before the extension of C. G.'s aforesaid patent, but also since that time, have been, and they now are, engaged without the license or consent of said C. G., or your orators, in making and selling, or causing or procuring to be made and sold, various kinds of goods of vulcanized rubber, which goods are included in the aforesaid rights of your orators. That the said defendants, in the making of such goods, have, as your orators are informed and believe, used a compound of India-rubber in

which sulphur was present when the compound was subjected to the action of artificial heat, so as to produce the aforesaid changes or effects. But your orators are informed and believe that said defendants claim or pretend, as to the whole or some of such goods, that they do not subject the same to the particular degree of heat mentioned by C. G. in his aforesaid specifications, or that in some manner they avoid following exactly the process of manufacture so described by him. But your orators aver and charge that the said pretense is unfounded, and that the goods so made by said defendants, or the compounds of which they are made, have, before the completion of the manufacture, at some time been subjected to the treatment or process described by C. G. as aforesaid, or some treatment or process substantially or practically similar in its nature and the same in its effects.

And your orators further show that, as they are informed and believe, the said defendants threaten to continue making and selling, or making or selling, or causing or procuring to be made and sold, or made or sold, such goods as are above described in this bill of complaint. And your orators say that they have been damaged and injured by such acts of the defendants and apprehend being further injured in future by the repetition or continuance of such acts.

And your orators pray that said several papers heretofore referred to in this bill of complaint, and of which copies are annexed as aforesaid, may be taken as part of such bill, your orators being prepared to prove the execution of the several agreements aforesaid, and the issuing of said letters patent and the giving of the opinion aforesaid in N. J., and being ready to produce all such documents and papers.

All which actings, doings and pretenses are contrary to equity and good conscience, and tend to the manifest injury of your orators in the premises.

In consideration whereof, and forasmuch as your orators can only have adequate relief in this court, where matters of this kind are properly cognizable and relievable; to the end, therefore, that the said the Beverly Rubber Company and their confederates, when discovered, may, upon their respective and corporal oaths, and to the best and utmost of their respective knowledge, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were now repeated and they severally interrogated thereto, and more especially that they may set forth particularly:—

*First.*— Whether the said suit was not brought against the said H. H. D. at the time and manner specified therein; and whether it did not result as herein described.

*Second.*— Whether said Beverly Rubber Company has not made and sold, or caused and procured to be made and sold, clothing or other goods; and if so, what kind and amount of articles in the manufacture of which, at any time during the process of manufacture, or in the completion thereof, there was used or employed a compound of India-rubber in which sulphur was present, to which compound, or the goods when made thereof, artificial heat was or had been applied, so as to produce in such compound or goods the effect of vulcanization.

*Third.*— Whether the said defendants have made and sold, or caused or procured to be made and sold, any, and if so, what description and quantity of goods of vulcanized rubber, or rubber compounded with sulphur, and subjected to the action of artificial heat, according to the process described in the aforesaid letters patent of C. G., or the specifications attached thereto.

*Fourth.*— Whether the said defendants have, since the said 15th day of June, A. D. 1858, made or sold, or caused or procured to be made or sold, any, and if so, what description and quantity of goods made of and from a compound of India-rubber, which compound had, at any time, or in any form, been subjected to artificial heat, so as to have become vulcanized within the meaning of that term as hereinbefore defined and used, or so as to become insensible to the action of heat or cold, or prevented from liability to decompose from the action of essential oils or animal perspiration. And that the defendants may answer the premises, and that they may be decreed to account with your orators for the quantity of articles which they have made in violation of the said letters patent or any of the rights of your orators, and to pay over to your orators such sums as may be proper as damages for such infringements, and that the defendants may be perpetually enjoined from any further violation of the rights of your orators, or of either of them. Or that your orators may have such other or further relief in the premises as may be consistent with equity and good conscience.

May it please your honors, the premises considered, to grant unto your orators the writ of injunction issuing out of and under the seal of this honorable court directed to the said Beverly Rubber Company, commanding and strictly enjoining them, and each of them, not to manufacture, use or sell, or cause or procure to be manufactured or sold, any articles of vulcanized rubber, or any articles made of a compound of India-rubber in which sulphur is present in any form or degree, such compound, or the fabric made therefrom, having been at any time subjected to the action of artificial heat so as to be changed or affected in the manner described in the aforesaid letters patent or specifications, or so as to have become insensible to heat or cold, or not liable to decompose from the action of essential oils or animal perspiration, and from taking or selling any article made from a compound which has been at any time so vulcanized or affected or changed.

And also the writ of subpoena issuing out of and under the seal of this honorable court, directed to the said defendants, commanding them to be and appear at a certain day, and under a certain penalty therein, to be expressed, before this honorable court, to answer the premises, and to stand to, perform and abide by such order, direction and decree as to your honors shall seem meet.

And your orators, etc.

E. M.

### *Bill to Restrain Infringement of Copyright.*

*To the Judges of the Circuit Court of the United States for the District of Massachusetts:*

The bill of complaint of C. F., T. G. W., L. T. and J. S., all of C., in the county of M., in said district, against B. M., N. C., G. P. L. and T. H. W., and C. W. U.,



Respectfully show your orators C. F., T. G. W. and L. T., printers, and publishers and copartners, doing business under the name and style of F., W. & T., and J. S., gentleman, all of C., in the county of M., in said district of Massachusetts, and all being citizens of the United States, that the said J. S. is, and heretofore at the time of the infringement hereinafterwards mentioned was, proprietor of the copyright of a work of which the said J. S. is the author and compiler, entitled "The Writings of George Washington, being his Correspondence, Addresses, Messages and other Papers, official and private, selected and published from the original Manuscripts, with a Life of the Author, Notes and Illustrations, by J. S.," consisting of twelve volumes, of all which volumes respectively the copyright was taken out by said J. S., previous to the publication thereof respectively, and secured according to law, the said J. S., at the time of taking out and securing said copyrights respectively, and still being, a citizen of the United States, and the term of each and all of which copyrights has still more than eight years to run; and that said F., W. and T., before the infringement hereinafterwards complained of, had, by an agreement with said J. S., undertaken and become interested in and assumed a part of the risk and responsibility of the publication of said work, and have ever since continued, and still continue, to be thus interested, and that ever since the first publication of the several volumes of said work the public have been supplied with copies of the same by said J. S. and the publishers of the same at reasonable prices; and that said J. S. and said F., W. & T. have incurred very large expenses upon said publication, and have been and are in the receipt of large amounts, the proceeds of the sale of said work, to reimburse their expenses, and remunerate their labor and care bestowed on the same. And your orators further show that they, your orators, being in the receipt of large sums, the proceeds of the sale of said work as aforesaid, under said copyrights, B. M., N. C. and T. H. W., all of B., in the county of S., in said district of Massachusetts, and G. P. L., of C., in the county of M., in the district of New Hampshire, booksellers, being copartners under the name, style and firm of M., C., L. & W., and also C. W. U., of S., in the county of E., in said district of Massachusetts, clerk, all of them well knowing that said J. S. held such copyrights and said F., W. & T. were interested in the said publication, and deliberately, after due notice, intending to infringe said copyrights, at said B., on the 5th day of August, in the year of our Lord 1840, and at divers times before and since the said 5th day of August, without the allowance and consent of your orators, or either of them, published and exposed to sale and sold a work in two volumes entitled "The Life of Washington," in the form of an autobiography, the narrative being, to a great extent, conducted by himself in extracts and selections from his own writings, with portraits and other engravings, consisting of — pages in the whole, which they still continue to expose to sale, having had due notice, and well knowing that the same is a copy from, and an infringement and piracy of, said "Writings of George Washington, etc., with a Life of the Author," so published by your orators as aforesaid. And your orators aver that three hundred and eighty-eight pages of said piratical work are copied *verbatim et liberatim* from the said work so edited and compiled by said J. S. as aforesaid, and so published by your orators as

aforesaid, consisting of matter which was published originally by said J. S. under his said copyright, and which had never before been published or printed, and which he, the said J. S., and his assigns, had the exclusive right and privilege to print, publish, and sell and expose to sale; and that many other parts of said piratical work published by said parties complained of, besides said three hundred and eighty-eight pages, are infringements upon said J. S.'s said copyrights, whereby your orators have sustained great damage, detriment and injury. And your orators further show that said M., C., L. & W. and U. still continue and threaten hereafter to continue to print, publish and expose to sale and sell copies of the said piratical work, the protests, expostulations and warnings of your orators to them to the contrary notwithstanding. All which writings, doings and pretenses are contrary to equity and good conscience, and tend to the wrong and injury of your orators in the premises. In consideration whereof, and forasmuch as your orators are remediless in the premises at law, and cannot have adequate relief save in a court of equity, where matters of this and the like nature are properly cognizable and relievable, and to the end that said M., C., L. & W. and U. may appear and answer all and singular the matters and things hereinbefore set forth and complained of, particularly how many copies of said piratical work they have sold, what number they have on hand, and that they be restrained by injunction issuing from this court from selling or exposing to sale, or causing or being in any way concerned in the selling or exposing to sale, or otherwise disposing of, any copies of said piratical work, and that they be ordered and decreed to render an account of the copies of the same that they have sold, and to pay over the profits of such sales to the plaintiffs, and that they be ordered to surrender and deliver up the copies on hand and the stereotype plates of said piratical work to an officer of this court to be canceled and destroyed, and be ordered to pay the plaintiffs their costs; and that your orators may have such other and further relief as to this honorable court may seem meet, or as equity may require,— may it please this honorable court to grant to your orators a writ of subpoena directed to the said M., C., L. & W. and U., commanding them at a day certain, and under a certain penalty to be therein inserted, personally to be and appear before this honorable court, then and there to answer the premises, and to stand and abide such order and decree therein as to this honorable court shall seem agreeable to equity and good conscience.

P. & R., by their Solicitors.

*Bill to Cancel Decree of Naturalization.*

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR  
THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI — *sa.*

THE UNITED STATES	}	IN EQUITY.
<i>vs.</i>		
— — —, Defendant.		

*To the Judges of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri:*

The United States, by W. H. H. Miller, its attorney-general, and Geo. D. Reynolds, the United States attorney for the eastern district of Missouri, brings this its bill against — — —, a resident of the city of St. Louis, in the division and district aforesaid, and an alien and subject of the — — —.

And thereupon your orator complains and says that on or about the — — — day of — — —, 18—, the said defendant, who then was and now is an alien and subject of the — — — of — — —, appeared in the St. Louis — — —, it then being a court of record of the State of Missouri, purporting to have common-law jurisdiction, and a seal and clerk, and at a term and session thereof then being holden in the city of St. Louis, within the division and district aforesaid, and applied to be admitted a citizen of the United States.

That thereupon said court, on the day and year last aforesaid, entered up a decree purporting to admit said defendant to be and become a citizen of the United States, under the provision of section 2167 of the Revised Statutes of the United States, in and by which decree it is recited, among other things, that said defendant had proven to the satisfaction of the court, by the testimony of one — — —, that he had arrived in the United States a minor under the age of eighteen years; that he had resided in the United States at least five years, including the three years of his minority, and in the State of Missouri at least one year immediately preceding his said application, and that for three years prior thereto it had been *bona fide* his intention to become a citizen of the United States. That thereupon a certain copy of said decree as aforesaid was delivered to said defendant, who ever since has claimed, by virtue of said pretended decree, and not otherwise, to be a duly naturalized citizen of the United States, and now claims that by virtue of said proceedings he is such citizen, and as such is entitled to all the rights, privileges and franchises of a citizen of the United States, and claims to be entitled to the protection of the United States as a citizen thereof.

Your orator states and charges that it is not true that the said defendant was a minor under the age of eighteen years when he arrived in the United States; it is not, nor was it then, true that he had resided in the United States for three years next preceding his arriving at the age of twenty-one years; it is not, nor was it then, true that he had resided in the United States at least five years, including the three years of his minority; it is not, nor was it then, true that it had been *bona fide* his intention, for two years next preceding the date of his application, to become a citizen of the United States.

And your orator further states and charges that the decree aforesaid was obtained by defendant from the court aforesaid by fraud and perjury, wil

fully and knowingly committed at and before the court aforesaid, which fraud and perjury was and is that the defendant introduced witnesses for the purpose of obtaining the said decree, who, having been duly sworn, wilfully testified falsely in substance and to the effect following, to wit, that said defendant was under the age of eighteen years when he arrived in the United States, and that he had resided in the United States three years next preceding his arrival at the age of twenty-one years, whereas, as the said defendant and said witnesses well knew, such were not the facts, nor were any of such facts known to any of said witnesses.

And your orator charges that the facts aforesaid, as to the qualifications of defendant, were not proven or made to appear to the satisfaction of the court aforesaid by the testimony of any witness who had any knowledge thereof, nor in any lawful manner, nor by any competent or lawful testimony whatsoever, and that said decree was based upon the fraudulent and false testimony aforesaid, and said court was induced to render it by and through mistake as to the true facts, as well as by the fraud and perjury aforesaid, and the imposition practiced upon it by said defendant.

And your orator further charges and represents that said defendant did then and there, on the hearing of his said application, make and cause to be made, in, to and before said last-named court, with the intent to procure and to aid in procuring his naturalization as aforesaid, and the issue of the certificate of citizenship to him, a false statement, which was and is that the said defendant, at the time he arrived in the United States, was under the age of eighteen years, and had resided in the United States three years next preceding his arrival at the age of twenty-one years; whereas, in truth and in fact, as the said defendant then and there well knew, he was not, at the time he arrived in the United States, under the age of eighteen years, and had not resided in the United States three years next preceding his arrival at the age of twenty-one years.

Your orator further charges and represents that, for the purpose of obtaining said decree, said defendant did then and there, on the hearing of said application, commit a fraud upon the plaintiff and said court by then and there intentionally and knowingly concealing from said last-named court the facts that at the time he arrived in the United States he was over the age of eighteen years, and had not resided therein three years next preceding his arrival at the age of twenty-one years, and by then and there intentionally and knowingly failing and refusing to make known to said last-named court the facts that at the time he arrived in the United States he was over the age of eighteen years, and had not resided therein three years next preceding his arrival at the age of twenty-one years, and by then and there falsely pretending in, to and before said last-named court, that at the time he arrived in the United States he was under the age of eighteen years, and had resided therein three years next preceding his arrival at the age of twenty-one years, and was then and there entitled to be admitted to become a citizen of the United States.

Your orator further represents that the United States had no notice of the said application of said defendant nor of the hearing thereof, and was not represented thereat, and had no opportunity to contest the false and fraudulent claim of the defendant, but that the proceeding was entirely *ex parte* and not contested, by reason whereof the real facts in the matter were not

presented to nor were they before the said last-named court on said hearing, and said court was imposed upon and induced by said false testimony offered by defendant, and mistake as to the real facts, and the aforesaid false and fraudulent pretenses and claims made by him and on his behalf, and suppression of the facts as aforesaid and by mistake of the facts, to then and there enter the decree aforesaid admitting said defendant to be a citizen of the United States under said application, the said defendant not being then and there entitled to be admitted to become such citizen either under such application or otherwise.

And your orator also charges that at the time when he obtained said decree the defendant had not, as he well knew, at least two years prior to his pretended admission, made the declaration required by the first subdivision of section 2165 of the Revised Statutes of the United States, nor did he come within any of the exceptions or other provisions of the statutes of the United States entitling him to said decree. To the contrary, your orator charges that said defendant procured said decree, contriving and conniving to work a fraud upon the United States and upon the court by which the decree was granted, and that defendant accepted it, and still claims the benefits thereof, well knowing that he was not then and is not now entitled to it, or to the benefits thereof, and that the court had been imposed upon, and had been induced to issue it through mistake of the true facts as aforesaid, and through the fraud and imposition practiced upon it as aforesaid.

And your orator further charges that the said pretended decree of naturalization was procured, as defendant well knew at the time he procured and accepted the same, without any compliance with the laws of the United States, and in fraud thereof; and your orator avers and charges that the existence of the fraudulent decree on its face entitled the defendant to exercise the rights of a citizen of the United States, and to claim its protection, whereto he is not entitled, and if the same remains uncanceled and in force, it can be used in fraud of the United States, and of persons relying thereon as a valid decree.

Your orator therefore prays that the said defendant may be compelled to answer all and singular the premises in this bill (but not under oath, answer under oath being hereby expressly waived). And your orator prays that the decree of naturalization aforesaid be declared null and void; that the said defendant be required to surrender up the certified copy thereof delivered to him; that he be forever restrained and enjoined from setting up or claiming any rights, privileges, benefits or advantages whatsoever under said decree; and that your orator shall have, generally, such other and further relief as the circumstances and nature of the case may require.

Therefore, that your honors will grant unto your orator the writ of subpoena issuing out of and under the seal of this court, to be directed to said ———, commanding him by a certain day to appear before your honors, in the court aforesaid, and then and there answer the premises and abide the order and decree of the court.

———,  
Attorney-General.

———,  
U. S. Atty. East. Dist. Mo.

———,  
Counsel for Plaintiff.

*Bill for Specific Performance of Contract for Policy of Insurance.*

*To the Judges of the Circuit Court of the United States for the District of Massachusetts:*

The Union Mutual Insurance Company, a corporation duly established by the laws of the State of New York, doing business at the city of New York, in the State of New York, bring this their bill of complaint against the Commercial Mutual Marine Insurance Company, a corporation duly established by the laws of the Commonwealth of Massachusetts, doing business at the city of Boston in said Commonwealth.

And thereupon your orators complain and say that in and by their charter and by the laws of the State of New York they were, on the 2d day of November, 1853, and ever since have been, authorized and empowered to make insurance, among other things, against loss by the perils of the seas and against loss by fire; that your orators, on the said 2d day of November, underwrote and caused one D. McKay to be insured for whom it might concern, payable in the event of loss to the said McKay, on one-eighth of the good ship Great Republic, the said ship having been valued at \$175,000, the sum of \$22,000, for the term of one year at and from the 2d day of November, 1853, at noon, until the 2d day of November, 1854, at noon, against loss from sundry designated risks, and especially from loss from the perils of the seas and from loss by fire, as will more fully appear from a copy hereunto annexed and made a part of this bill, of the policy issued by your orators to the said D. McKay.

Your orators further say that thereafter the aforesaid insurance so made by your orators upon the Great Republic, and on the night of the 26th of December, 1853, the said ship was totally destroyed and lost by fire, one of the perils insured against; that your orators thereupon became liable to pay, and thereafter such loss did pay, to the said D. McKay the full sum of \$22,000, the amount so as aforesaid by your orators underwritten.

Your orators further say that after they had insured the said McKay, as aforesaid, and before the loss aforesaid of the said ship, and before the commencement of the fire by which its destruction was produced, your orators requested and authorized Charles W. Storey, of Boston aforesaid, insurance broker, to cause and procure your orators to be reinsured in the sum of \$10,000 upon the said Great Republic, for the term of six months, against all and singular the risks by your orators theretofore assumed, and especially against loss from the perils of the seas and from fire.

Your orators further say that the said Charles W. Storey, as the agent of your orators, in that behalf duly authorized and in their name and behalf, on Saturday, the 24th day of December, 1853, made application to the said defendants for the reinsurance by them of your orators upon the said Great Republic, in and for the sum of \$10,000, for the term of six months from the 24th day of December aforesaid, against such risks as your orators had assumed, and especially against loss from the perils of the seas and against loss from fire; that the said application so made by the said Storey was made at the office and usual place of business of the said Commercial Mutual Marine Insurance Company in Boston; that it was so made in the first

instance to the secretary of the defendants, and immediately thereafter, and on the day last aforesaid, to George H. Folger, the president of the defendants, who was duly authorized to receive and act thereupon for the defendants.

Your orators further say that upon the making of the said application the said George H. Folger, after consulting and advising with some person then present, whose name is to your orators unknown, replied to the said Storey that the defendants would reinsure your orators, in the sum of \$10,000, upon the said Great Republic, and would assume the risks proposed for the term of one year, at and for a premium of six per cent. upon the sum to be underwritten; that they would insure against the said risks for the term of six months at and for a premium of three and one-half of one per cent. upon the sum to be insured.

Your orators further say that the said Storey, immediately thereafter the said application, communicated to your orators the terms upon which the said defendants would reinsure your orators upon the said Great Republic.

Your orators further say that on the said 24th day of December, your orators, upon being advised by the said Storey as aforesaid, directed, authorized and requested the said Storey, in the name and behalf of your orators to accept the terms aforesaid for six months, and to procure for your orators a reinsurance, in accordance therewith, from the 24th of December aforesaid.

Your orators further say that the said Storey as agent, and in behalf of your orators, on Monday, the 26th day of the said December, at or about 11 o'clock before noon, at the place of business of the said defendants in Boston, and before any loss or damage had occurred to the said Great Republic, notified the said Folger that your orators had accepted the proposition of the defendants to reinsure your orators for the term of six months from the 24th of December aforesaid at noon.

Your orators further say that on the said 26th day of December, and before any loss or damage had occurred to said ship, the above-named Storey, in behalf of your orators, embodied in a paper, partly printed and partly written, the terms of the contract of reinsurance, so as aforesaid, on the said 24th of December, in answer to the aforesaid application proposed to your orators by the said defendants, and so as aforesaid accepted on the morning of the 26th of December.

Your orators further say that the said paper was examined, approved and retained by the said Folger, he in this behalf acting for the defendants, and by him was, in the name of the defendants, assented to, and thereupon a contract of reinsurance by and between the defendants and your orators was complete and concluded upon the terms in said paper contained, by force whereof the defendants became and were liable and agreed to and with your orators to pay them the sum of \$10,000 in the event that the said ship Great Republic should be lost or damaged within six months from and after noon of the said 24th of December, by the perils of the seas or by fire.

Your orators further say that the said Folger, in behalf of the defendants and in their name and behalf, agreed with the said Storey, he acting for your orators, that a policy should be prepared and executed by the said defendants to your orators at the early convenience of the defendants, and delivered to your orators, containing, with other usual and accustomed

clauses, the terms of the contract of reinsurance, so as aforesaid concluded by and between your orators and the defendants, and so as aforesaid embodied and set forth in the paper aforesaid.

Your orators further say that the said Storey, on the 26th day of December aforesaid, was authorized, ready and willing in behalf of your orators to pay to the defendants or secure to their satisfaction, at their election, the premium, so as aforesaid agreed upon, on the said reinsurance, but the same was not then paid because the defendants were accustomed not to receive the premiums by them required in their contracts of insurance until the preparation and delivery of the policies by them agreed to be issued.

Your orators further say that the said Storey, on the said 26th day of December, immediately upon the conclusion of the aforesaid contract of reinsurance, advised your orators of its completion.

Your orators further say that the said Storey, on Tuesday, the 27th day of December aforesaid, notified the defendants that the said ship had been destroyed by fire and was totally lost, and at the same time asked Edmund R. Whitney, secretary at the time of the defendants, in the presence and hearing of the said Folger, at the office of the said defendants, if the policy had been prepared for your orators, to which the said Whitney, in the hearing of the said Folger, said no, assigning no reason for the delay, or intimating any refusal to execute such policy.

Your orators further say that the said Storey, on Wednesday, the 28th of December, called a second time at the office of the defendants and asked for the said policy, to which the said Folger replied, he was in doubt whether the contract was complete and obligatory, as it was made on a day regarded as Christmas Day, but he, the said Folger, had not made up his mind about it and did not want to talk on the subject then.

Your orators further say that one F. S. Lothrop, on the 30th of January, 1854, in behalf of your orators, made a draft upon the defendants for the sum of \$9,650, the amount of said reinsurance less the premium, payable at sight to John S. Tappan, your orator's vice-president, which draft was thereafter, on the 1st day of February, 1854, presented to the defendants, which they refused to pay or accept.

Your orators further say that the said Storey, in behalf and in the name of your orators, in that behalf duly authorized, on the 26th day of April, 1854, at the office of the defendants, made demand upon the aforesaid Folger for the execution and delivery of the policy so as aforesaid by the said defendants theretofore agreed to be by them executed and to your orators to be delivered, and at the same time tendered to the said defendants the sum of \$360 as and for premium, interest and cost of policy, with which request the said Folger, in the name of the said defendants and in their behalf, refused to comply.

Your orators further say that they have applied to the defendants for a copy of the aforesaid paper so left with them on the 26th day of December, which they refused to furnish.

And your orators well hoped that the defendants would have complied with the reasonable requests of your orators.

To the end, therefore, that the said defendants may, if they can, show your orators should not have the relief hereby prayed, and may, according



to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogations hereinafter numbered and set forth as by the note hereunder written they are required to answer, that is to say,—

1. Whether, upon your information and belief, etc.

2. Whether, etc.

3. Whether, etc.

Ftc., etc.

And your orators pray that the defendants may discover and produce the original paper or memorandum, so as aforesaid made by said Storey, and dated 24th of December, 1853, which was so as aforesaid left with their president at their place of business on the aforesaid 26th of December.

And that the said agreement of the defendants to execute and deliver to your orators a policy of reinsurance, according to the terms of the aforesaid paper, and in accordance with the defendants' contract of insurance as aforesaid, may be specifically performed, your orators hereby undertaking to perform their undertakings in the premises.

And that the said defendants may be decreed to pay to your orators the sum of \$10,000, the sum so as aforesaid by them reinsured to your orators, with interest thereon. And that your orators shall have such other and further relief as the case may require and as shall seem meet to the court, and as shall be agreeable to equity and good conscience.

And your orators pray this honorable court to issue a writ of subpoena in due form of law according to the rules of this court, to be directed to the Commercial Mutual Marine Insurance Company, a corporation by the law of Massachusetts, at Boston, commanding them on a certain day and under a certain penalty to be and appear before this honorable court, and to stand to, abide and perform such order and decree therein as to this court shall seem meet, and as shall be agreeable to equity and good conscience.

THE UNION MUTUAL INSURANCE COMPANY OF NEW YORK,

C. B. G., Counsel.

By C. B. G., their Attorney.

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### *Allegations in Bill to Reform Policy of Insurance.*

And thereupon your orator complains and says that on the — day of, etc., he was the sole owner of a ship or vessel of the value of \$—, called the —, then lying at Q., in the province of —, and bound on a voyage from said Q. to a port of discharge in said U. K., on board which said ship there had been and was then laden a cargo of merchandise, the property of various persons other than your orator, and which said merchandise your orator had agreed should be conveyed in said ship, from said Q. to said port of discharge, for a certain amount of hire or freight to be paid him by said parties respectively therefor, amounting in the whole to the sum of \$—. And your orator being desirous to procure said vessel and said freight to be insured for said voyage, at and from said Q. to said port of discharge, namely, the said ship for the sum of \$—, valued at \$—, and said freight for the sum of \$—, valued at \$—, against the perils of the seas and other risks usually contained in marine policies of insurance, on property of such

description, did, in writing by letter, bearing date, etc., request his agent, one J. E. O., of said Q., to procure the same to be insured on account of your orator, and to have the policies of insurance thereon in the name of your orator, a copy of which letter, marked (A), your orator hereto annexes and prays that the same may be taken as a part of this his bill of complaint.

And your orator further sheweth that said J. E. O. afterwards, on the — day of the same —, in compliance with the request of your orator, did, through one H. M., of —, broker, request one A. McL., of the city of —, and State of —, insurance broker, to procure said insurance upon said ship and said freight, to be made and effected at some proper and solvent insurance company in said —, or in —, in said State of —, and did cause to be transmitted to said A. McL., insurance broker as aforesaid, a copy of your orator's said letter, bearing date the said —; and thereupon the said A. McL. being unable to procure said insurance to be made and effected for a reasonable premium in said —, did, in writing, authorize and request one D. R. M., of said —, commission merchant, to cause said insurance to be made and effected by some proper insurance company in said —, which said written request and authority so given by said A. McL. to said D. R. M. was and is contained in two certain letters written by the said A. McL. to said D. R. M., one of which letters bears date, etc., and the other of said letters bears date, etc.; and your orator hereto annexes copies of both said letters marked (B and C), and prays that the same may be taken as parts of this his bill of complaint.

And your orator further shows that in said letter of said A. McL., bearing date the, etc., by accident and mistake the said D. R. M. was directed to cause said ship to be insured for the sum of \$—, to be valued at the sum of \$—, and said freight to be insured at the sum of \$—, and to be valued at the sum of \$—; and in and by said letter of said A. McL., bearing date the said —, said mistake was in part corrected, and said D. R. M. was directed to insure said ship for the sum of \$—, and to insure said freight for the sum of \$—; but by accident and mistake the sum for which said ship and said freight were to be valued thereon was wholly omitted.

And your orator further shows that the said D. R. M., after receiving said letters on the —, did apply to the said Commercial Mutual Marine Insurance Company to make insurance upon said ship and freight for your orators, according to the order and request of the said A. McL., and did then and there exhibit both said letters of said A. McL. to said insurance company, with the intent to inform said insurance company as well of the relation of said A. McL. as agent of the owners of the said ship as to enable them to determine the character of the risk to be insured, and said insurance company did afterwards read and examine said letters, and on the same day did agree with the said D. R. M., acting as the agent of your orator, to insure the said ship on the voyage aforesaid, at and from said Q., for the sum of \$—, to be valued at the sum of \$—, and to insure the said freight of said ship on said voyage for the sum of \$—, to be valued at the sum of \$—, and to receive as premium therefor the sum of \$—.

And your orator further shows that thereafterwards, on the, etc., —, the said insurance company, with the intent and design to carry into effect said agreement, did cause to be made a writing or policy of insurance,

signed by the president and secretary, bearing date, etc., a copy of which is hereto annexed, marked (D), which your orator prays may be taken as part of this his bill of complaint, and did deliver said policy to said D. R. M., the agent of your orator, as aforesaid, and did receive from said D. R. M., the agent of your orator, said premium of \$—, which sum was thereafterwards by your orator repaid to said D. R. M.

And your orator further shows that although, when said insurance company had so agreed to insure said ship and freight for the amounts aforesaid, it was well known to said insurance company that said A. McL. was merely the agent of the owner of said ship and of the person entitled to, and solely interested in, said freight; and that he, said A. McL., had no insurable or other interest whatever in either said ship or said freight, and that said A. McL. was, by profession and pursuit, a mere insurance broker, and that he was acting as the agent of the person who owned said ship and who was solely interested in said freight, and yet by accident and mistake said insurance on said ship and said freight was, by the terms of said policy, etc., declared to be on account of said A. McL., and without adding thereto the word agent or any other term indicating that he, the said A. McL., was insured as said agent of the party owning said ship and interested in said freight, and without the usual clause, commonly inserted in such policies, that said insurance was effected for whom it might concern.

And your orator further shows that said insurance company knew, and was distinctly informed by said D. R. M. by said letter of said A. McL. to said D. R. M., bearing date, etc., and submitted to and read by them as aforesaid, that said A. McL. was the mere agent of and broker for the owner of said ship, and had no interest whatever in said ship or freight, except so far as he would be entitled to the usual commission of a broker for procuring said insurance; and the said insurance company did agree, consent and understand at the time said agreement to insure said ship and freight was made with said D. R. M., and before said policy so made to carry said agreement into effect was written and signed, that said insurance was to be made for the benefit and on account of the owner of said ship; and that said A. McL. was not the owner of said ship nor interested therein or in said freight, and that by mere inadvertence, accident and mistake in writing said policy of insurance, it was omitted to be inserted in said policy that said insurance was made on account of said A. McL. as agent and for whom it might concern.

And your orator further shows unto your honors that said policy was received by the said D. R. M. and transmitted to the said J. E. O., the agent of your orator, and by him kept and retained in ignorance that by the terms and legal effect thereof no other interest was insured thereby save that of the said A. McL., and in the full understanding as well by said A. McL., said D. R. M. and said J. E. O., that the interest of your orator in said ship and freight, to the extent of the sums named in said policy, was thereby insured and protected, in accordance with your orator's directions contained in his said letter to said J. E. O., bearing date the said, etc.

And your orator further shows, etc. [*Here state the loss of, etc.*]

And your orator submits to your honors that, by reason of the premises, he is justly and equitably entitled to have said mistake so made in drawing

said policy of insurance corrected, and said policy reformed by inserting therein that said insurance was made on account of A. McL. as agent, or for whom it may concern; and that the sums so insured by said company on said ship and said freight be paid to him accordingly.

And your orator further shows unto your honors that previously to this suit being commenced, on the — day of —, and since, he applied to and requested, and caused applications to be made to, said insurance company, to act towards your orator in such a way as is equitable and just, and to re-form said policy as aforesaid, and to adjust and pay to him the sums so insured by them on said ship and said freight, and so lost to your orator as aforesaid by reason of the perils insured against in said policy, and exhibited to said insurance company the usual and proper proofs of said agency of said A. McL. and of said loss, and of his sole ownership of said ship and sole interest in said freight at the time of said agreement so made with the agent of your orator by said insurance company to insure the same as aforesaid, and your orator well hoped that said insurance company would have yielded to his said applications and paid to him the sums so insured by them and lost by him as aforesaid.

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### *Allegation in Bill to Perpetuate Testimony.*

Humbly complaining, sheweth unto your honors the plaintiff A. B., of etc., that C. D., late of, etc., deceased, before and at the time of making his will hereinafter mentioned, was seised in fee of and in divers freehold estates, which are hereinafter more fully mentioned and described; and the said C. D., being so seised as aforesaid, and being of sound and disposing mind, memory and understanding, duly made and published his last will and testament in writing, bearing date the — day of —, signed by him, the said C. D., and subscribed and attested according to law; and which said will, with the attestation thereof, is in the words and figures following; that is to say [*set out the will and the attestation verbatim*], as by the said will and the attestation clause thereof, reference being thereto had, will appear.

And the plaintiff further sheweth unto your honors that the said C. D. departed this life on or about the — day of —, without having revoked or altered his said will, leaving his brother E. D., of, etc., the defendant hereinafter named, his heir at law; and upon the death of the said testator, the plaintiff, under and by virtue of the said will, entered upon and took possession of all the said freehold estates thereby devised to the plaintiff for life, and the plaintiff is now in possession thereof. And the plaintiff hoped that no disputes would have arisen respecting the devises contained in the said will, or the validity thereof. But now so it is, etc., the said E. D. pretends that the said will is void and ineffectual; and although he will not dispute the validity thereof during the lives of the subscribing witnesses thereto, yet he threatens and intends to do so when they are dead, so that the plaintiff may be deprived of their testimony.

And the plaintiff further sheweth that all of the said subscribing witnesses are upwards of seventy years of age and in feeble health [*or, are*

about to depart from the Commonwealth or State], and that the plaintiff fears the testimony of the said witnesses may be lost by their death [or, departure from the Commonwealth or State] before the cause can be investigated in a court of law.

In consideration whereof, etc.; and that the plaintiff may be at liberty to have the several subscribing witnesses to said will examined, and that the plaintiff, if necessary, may have a commission or commissions for the examination of the said subscribing witnesses to the said will, to the end that their testimony may be preserved and perpetuated; and that the plaintiff may be at liberty to read and make use of the same on all future occasions, as he shall be advised. May it please your honors, etc.

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### *Bill of Review for Errors Apparent.*

[Title and address.]

Complaining, sheweth unto your honor, your orator A. B., of, etc. nat on or about —, C. D., of, etc. (the defendant hereinafter named), exhibited his bill in this honorable court against your orator, and thereby set forth that [insert substance of original bill], and praying [set out prayer verbatim]. And your orator being served with a subpoena for that purpose appeared and put in his answer to the said bill, to the effect following: [Insert substance of answer.] And the said C. D. replied to the said answer, and issue having been joined, and witnesses examined, and the proofs closed, the said cause was brought to a hearing before your honor on the — day of —, when a decree was pronounced, which was afterwards settled and entered; by which it was ordered, adjudged and decreed that [set forth the decree].

And your orator further shows unto your honor that the said decree has since, and on or about the — day of —, been duly signed and enrolled; which said decree your orator insists is erroneous, and ought to be reviewed, reversed and set aside for many apparent errors and imperfections, inasmuch as it appears by your orator's answer [here insert the apparent errors]. And no proof being made thereof, no decree ought to have been made or grounded thereon, but the said bill ought to have been dismissed for the reasons aforesaid. For all which errors and imperfections in the said decree, appearing on the face thereof, your orator has brought this his bill of review, to be relieved in the premises.

In consideration whereof, and inasmuch as such errors and imperfections appear in the body of the said decree, your orator hopes that the said decree will be reversed and set aside, and no further proceedings had thereon.

To the end, therefore, that the said C. D. [interrogatories in usual form], and that for the reasons and under the circumstances aforesaid the said decree may be reviewed, reversed and set aside, and no further proceedings taken thereon.

May it please, etc. [prayer for subpoena in usual form].

*Petition for Leave to File a Bill of Review for New Matter.*

The petition of A. B., the above complainant, respectfully sheweth that on or about the — day of — your petitioner filed his bill in this honorable court against C. D. for the purpose of [*state general object of original bill*], and praying [*state the prayer verbatim*].

And your petitioner further shows that the said C. D., being served with process of subpoena, appeared to the said bill and put in his answer thereto, to which a replication was filed. And the said cause was thereupon examined on both sides, and the proofs closed. And that the said cause was brought to a hearing before your honor on —, whereupon a decree was made to the following effect [*set forth substance of decree*].

And your petitioner further shows that such decree has since been duly enrolled.

And your petitioner further sheweth that since the time of pronouncing the said decree your petitioner hath discovered new matter of consequence in the said cause; particularly that E. F., deceased, the uncle of the said C. D., of whom the said C. D. claims to be sole heir-at-law, left two sons and a daughter him surviving, named respectively, etc., who were his heirs-at-law; and that such sons and daughter are still alive and residing at, etc.; which new matter your petitioner did not know, and could not by reasonable diligence have known, so as to make use thereof in the said cause, previous to and at the time of pronouncing the said decree.

Your petitioner therefore prays that he may be at liberty to file a bill of review for the purpose of having the said decree reviewed, reversed and set aside, and that no further proceedings may be had under the same.

And your petitioner, etc.

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*Bill of Review for New Matter.*

[*Title and address.*]

Humbly complaining, sheweth unto your honors the plaintiff A. B., of, etc., that on or about —, C. D., of, etc., the defendant hereinafter named, exhibited his bill of complaint in this honorable court against the plaintiff, and thereby set forth that, etc. [*Here insert the original bill.*] And the plaintiff being duly served with process for that purpose, appeared and put in his answer to the said bill, to the effect following: [*Here state the substance of the answer.*] And the said C. D. replied to the said answer, and issue having been joined and witnesses examined, and the proofs closed [*or, the said C. D. joined issue on the answer, and*], the said cause was set down to be heard, and was heard before your honors on the — day of —, when a decree was pronounced, whereby your honors decreed that the plaintiff's title to the premises was valid and effectual, after which the said C. D. petitioned your honors for a rehearing, and the said cause was accordingly reheard, and a decree of reversal made by your honors on the ground of the said C. D. being the heir-at-law of the said E. F., deceased, and which said decree of reversal was afterwards duly signed and enrolled, as by the

said decree and other proceedings now remaining filed as of record in this honorable court, reference being thereto had, will appear. And the plaintiff sheweth unto your honors, by leave of this honorable court first had and obtained for that purpose, by way of supplement, that since the signing of the said decree of reversal the plaintiff has discovered, as the fact is, that the said E. F. was, in his life-time, seised in his demeane as of fee, of and in the hereditaments and premises in question in the said cause, and that the said E. F., while so seised, and when of sound mind, duly made and published his last will and testament in writing, bearing date on the — day of —, which was executed by him, and attested according to law, and thereby gave and devised unto the said J. W., his heirs and assigns forever, to and for his and their own absolute use and benefit, the said hereditaments and premises in question in the said cause (to which the plaintiff claims to be entitled as purchaser thereof from the said J. W.). And the plaintiff further sheweth unto your honors that since the said decree of reversal was so made, signed and enrolled as aforesaid, and on or about —, the said C. D. departed this life intestate, leaving G. H., of, etc. (the defendant hereinafter named), his heir-at-law, who, as such, claims to be entitled to the said hereditaments and premises, in exclusion of the plaintiff. And the plaintiff is advised and insists that, under the aforesaid circumstances, the said last-mentioned decree, in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed; and that the first decree, declaring the plaintiff entitled to the said hereditaments and premises, should stand and be established and confirmed; and for effectuating the same, the said several proceedings, which became abated by the death of the said C. D., should stand and be revived against the said G. H. as his heir-at-law.

To the end, therefore, etc. And that the said suit may be revived against the said G. H., or that he may show good cause to the contrary, and that the said last decree, and all proceedings thereon, may be reviewed and reversed, and that the said first-mentioned decree may stand and be established and confirmed, and be added to, by the said will being declared a good and effectual devise of such hereditaments and premises as aforesaid; and that the said G. H. may be decreed to put the plaintiff into possession of the said hereditaments and premises, and in the same situation, in every respect, as far as circumstances will now permit, as the plaintiff would have been in case such last decree had never been pronounced and executed; and that the plaintiff may have such other, etc. May it please, etc.

*[Pray subpoena to revive and answer against the said G. H.]*

*Bill of Revivor.*UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW  
YORK.

THE WESTERN LOOM COMPANY

vs.

EMMA L. HIGGINS, EUGENE HIGGINS  
and JOSEPHINE BROOKS, as Ex-  
ecutors of the Last Will and  
Testament of ELIAS S. HIGGINS,  
Deceased,

and

JULES REYNAL AND JOHN H. HIG-  
GINS, Surviving Trustees, and  
NATHALIE FLORENCE REYNAL,  
Residuary Legatee under the  
Last Will and Testament of  
NATHANIEL D. HIGGINS, De-  
ceased.

IN EQUITY.

*To the Honorable the Judges of the Circuit Court of the United States for  
the Southern District of New York:*

The Webster Loom Company, a corporation organized under and pursuant to the laws of the State of New York, and having its principal place of business in the city of New York, in said State, and being a resident of the said city of New York within the meaning of the statutes defining the jurisdiction of this court, brings this its bill of revivor against Emma L. Higgins, Eugene Higgins and Josephine Brooks, as executors of the last will and testament of Elias S. Higgins, deceased, and Jules Reynal and John H. Higgins, surviving trustees,—and Nathalie Florence Reynal, residuary legatee under the last will and testament of Nathaniel D. Higgins, deceased. Said Emma L. Higgins, Josephine Brooks, Eugene Higgins, Jules Reynal, John H. Higgins and Nathalie Florence Reynal, being citizens of the State of New York and residents of the city of New York, in said State; and thereupon your orator complains and says that on or about the 19th day of June, 1874, your orator filed a bill in equity in this court against Elias S. Higgins and Nathaniel D. Higgins, alleging infringement by them of certain letters patent of the United States, which were numbered No. 180,961 and dated August 27, 1872, of which your orator was at that time, and is now, the owner.

That thereafter the said Elias S. Higgins and Nathaniel D. Higgins, having been duly served with the writ of subpoena, appeared by counsel and filed their answer to said bill of complaint, to which answer a replication was filed on the part of your orator.

That thereafter your orator proceeded to take proofs in support of its said bill of complaint; and thereafter said defendants proceeded to take proofs in support of their said answer and in defense of said actions.

That thereafter said suit was brought to final hearing before the Honorable Hoyt H. Wheeler; that said judge filed his decision on the 31st day of May, 1879, adjudging invalidity of the fifth claim of the patent—being the claim



in suit—and dismissing the said bill of complaint, as by reference to said decision reported in 15 Blatchford, 446, will more fully and at large appear.

That thereafter your orator appealed to the Supreme Court of the United States from the decision of the circuit court for the southern district of New York; that the said appeal was argued before said Supreme Court of the United States, and a decision made by said court, the opinion being written by Mr. Justice Bradley, adjudging the validity of said patent and that defendants had infringed the same and remanded the cause to this court, ordering a decree against said defendants restraining them from further infringement, and also granting a reference to a master to ascertain and report damages and profit caused by said infringement,—all of which will more fully and at large appear by reference to said decision reported in 15 Otto, 580.

That thereafter the accounting in this cause was commenced and voluminous proofs taken.

That thereafter the master filed his report awarding nominal damages to your orator against said defendants.

That thereafter, on exceptions duly filed to said report, argument was had before His Honor Judge Shipman, on motion to confirm said master's report; that said judge filed an opinion on the 26th day of July, 1889, recommitting said accounting to the master for further action in accordance with said opinion. That no order has yet been entered on Judge Shipman's decision.

That during the pendency of said accounting the defendant, Nathaniel D. Higgins, died, leaving a last will and testament, which, on the 31st day of January, 1882, was admitted to probate in the surrogate's court of New York county, New York, and letters executory thereupon were on said 31st day of January, 1882, duly issued out of said surrogate's court unto Elias S. Higgins, Jules Reynal and John H. Higgins.

That said will, after directing the payment of an inconsiderable percentage of the testator's estate as specified legacies to certain persons therein named, directed the said executors to hold in trust for the benefit of the testator's grandchildren, for a period of time that has not yet expired, the sum of one million and five hundred thousand dollars, and to pay the rest and residue of testator's estate unto his daughter Nathalie Florence Reynal.

That on the 31st day of December, 1888, said executors filed their final accounting in the office of the surrogate of the county of New York, N. Y., whereby it appeared that they had paid said specific legacies, and that after paying to Nathalie F. Reynal aforesaid a sum amounting to between three and four millions of dollars, they still retained in trust for the benefit of said grandchildren of said testator the sum of one million and five hundred thousand dollars.

That said account was approved by said surrogate and an order was entered in the court of said surrogate on the 31st day of December, 1888, discharging and releasing said Elias S. Higgins, Jules Reynal and John H. Higgins from their duties as executors under said last will and testament, but directing them to continue to hold said trust fund of one million and five hundred thousand dollars as directed in said last will and testament.

That said Elias S. Higgins, Jules Reynal and John H. Higgins thenceforth continued to so act as trustees under said will as to said trust fund, and said Jules Reynal and John H. Higgins are now so acting.

That the aforesaid Elias S. Higgins died upon the 18th day of August, 1889, leaving a last will and testament, which on the 14th day of September, 1889, was admitted to probate in the surrogate's court of New York county, New York, and letters executory thereupon were on said 14th day of September, 1889, duly issued out of said surrogate's court unto Emma L. Higgins, Eugene Higgins and Josephine Brooks, and still remain in full force and virtue.

Wherefore your orator prays that the said cause may be revived by the decree of this honorable court, and that it may proceed to a decree in its favor in accordance with the prayer of the original bill of complaint herein.

Your orator further prays that a writ of subpoena may issue in due form of law, directed to the aforesaid defendants Emma L. Higgins, Eugene Higgins and Josephine Brooks, as executrices and executor of the estate of Elias S. Higgins, deceased, and Jules Reynal and John H. Higgins as trustees, and Nathalie Florence Reynal as residuary legatee under the will of Nathaniel D. Higgins, deceased, and requiring them to appear and show cause, if any they have, why this cause should not be revived; and if no cause shall be shown by said defendants why said suit should not be revived, that a decree be entered reviving said suit in favor of your orator.

And your orator will ever pray, etc.

WEBSTER LOOM COMPANY,

By WM. G. SMITH, Prest.

BROWN & JONES,

Solicitors and of Counsel for Complainant,

5 Beekman Street, New York.

STATE OF NEW YORK, } ss.  
City and County of New York. }

William G. Smith, being duly sworn, says that he resides in the city and county of New York, and is the president of the Webster Loom Company, the complainant herein; that he has read the foregoing bill of revivor and knows the contents thereof, and that the same is true of his own knowledge.

Deponent further says that the reason why this verification is not made by the complaint is that it is a corporation; that deponent is an officer of the same, to wit, president.

WM. G. SMITH.

Sworn to before me this 8d day of December, 1889,

[SEAL.]

A. G. N. VERMILYE,

Notary Public, N. Y. Co.

### *Prayer for a Ne Exeat*

And that the said defendants may be stayed by the people's writ of *ne exeat respublica* from departing out of the jurisdiction of this court. And that your orator [prayer for general relief]. May it please your honor to grant unto your orator the people's writ of *ne exeat respublica* staying the said C. D. and E. F., or either of them, from departing into parts beyond this State, and out of the jurisdiction of this court, without leave first had.

*Affidavit to Obtain a Ne Exeat.*

IN CHANCERY [or, EQUITY].

Between W. B. R. AND OTHERS,  
 Plaintiffs,  
 and  
 H. W. H., Defendant.

}

COMMONWEALTH OF MASSACHUSETTS, } ss.  
 County of Suffolk,

I, W. B. R., one of the above-named plaintiffs, being duly sworn, depose and say that the above defendant is actually and justly indebted to the said plaintiffs in the sum of \$3,000, for [here state the ground and circumstances of indebtedment]; for the recovery of which the said plaintiffs did, on the — day of —, file their bill of complaint in the office of — for said county of Suffolk, against the said defendant; to which said bill the said defendant has not yet answered; and, being so indebted, the said defendant has lately declared in the presence of each of the plaintiffs, and informed them, and this deponent verily believes, that he will without delay leave this Commonwealth and go to live and reside in parts beyond the seas [or, in California or Texas], out of the jurisdiction of this court. And this deponent has no doubt, but verily believes, that if the said defendant should be allowed to depart out of this Commonwealth, the plaintiffs' debt will either be entirely lost to them, or the recovery thereof greatly endangered.

Sworn, etc.

W. B. R.

[Certificate of allowance.]

*Order for Writ of Ne Exeat to Issue.*

Upon motion, etc., and upon reading an affidavit of, etc., filed, etc. [enter evidence, and if before appearance, and the clerk's certificate of the filing of the plaintiff's bill in this cause on the — day of —]; and the plaintiff by his counsel undertaking, etc. [as to damages]: This court doth order that a writ [or, one more writ or writs] of *ne exeat regno* do issue against the said defendant A., until this court make another order to the contrary; and the said writ [or, writs] is [or, are] to be marked for security in the sum of \$— in words, at length, and not in figures.

*Writ of Ne Exeat.*

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To the Marshal of  
 the Southern District of New York, GREETING:

Whereas it is represented to us in our circuit court of the United States for the southern district of New York in equity on the part of Bradley Dewey, complainant, against Charles Merritt, defendant (among other things), that he, the said defendant, is greatly indebted to the said com-

plainant and designs quickly to go into parts without the United States (as by oath made on that behalf appears), which tends to the great prejudice and damage of the said complainant: Therefore, in order to prevent this injustice, we do hereby command you that you do without delay cause the said Richard Blodgett personally to appear before you and give sufficient bail or security in the sum of \$5,000 that the said Charles Merritt will not go or attempt to go into parts without the United States without leave of our said court; and in case the said Charles Merritt shall refuse to give such bail or security, then you are to commit the said Charles Merritt to our next prison there to be kept in safe custody until he shall do it of his own accord; and when you shall have taken such security, you are forthwith to make and return a certificate thereof to us in our said circuit court of the United States for the southern district of New York distinctly and plainly under your hand together with this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States at the city of New York in the county and State of New York, the 18th day of November, 1889.

JOHN A. SHIELDS, Clerk. [L. S.]

WALTER S. JUDD, Solicitor for Complainant,  
120 Broadway, New York.

*Indorsement:* Writ of *ne exeat* for the sum of \$5,000.

Let the within writ issue.

E. HENRY LACOMBE, Circuit Judge.

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### *Bond to Sheriff upon a Ne Exeat.*

Know all men by these presents that we, C. D., of the city of Albany, merchant, and E. F. and G. H., of the same place, gentlemen, are held and firmly bound unto J. S., sheriff of the county of Albany, in the penal sum of \$——, to be paid to the said J. S., sheriff as aforesaid, or his assigns. For which payment well and truly to be made, we bind ourselves jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated the —— day of ——, 18——.

Whereas the above-named C. D. has been arrested upon a writ of *ne exeat* issuing out of and under the seal of the court of chancery of the State of New York in a certain cause therein pending, wherein A. B. is complainant and the said C. D. is defendant, and is now in custody of the said J. S., sheriff as aforesaid, by virtue thereof:

Now, the condition of this obligation is such, that if the said C. D. shall not depart from or leave this State without the permission of the court of chancery, then this obligation to be void; otherwise to be and remain in full force and virtue.

*Notice of Motion for the Discharge of Ne Exeat.*

[*Title of cause or matter.*]

Take notice that this honorable court will be moved before [*state what judge or court*] on —, the — day of —, instant [*or, next*], at — o'clock in the — noon, on the part of the defendant, C. D., that the writ of *ne exeat regno* issued against him pursuant to the order dated the — day of —, 18—, and the said order, may be discharged with costs, including the costs of this application; and that the plaintiff may be ordered to pay such costs to the said defendant,— *If so*; and that the bond given by the said defendant to the sheriff of —, pursuant to the said order and writ, may be delivered up to be canceled. And that an inquiry may be made what damages have been sustained by the said defendant by reason of the said order having been made. And that the plaintiff may be ordered, pursuant to his undertaking, contained in the said order, to pay to the said defendant, within (one month) after the date of the master's certificate of the result of such inquiry, what shall be thereby certified in respect of such damages.

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*Petition for Leave to File Supplemental Bill.*

The petition of A. B., the above complainant, respectfully sheweth that on or about the — day of — your petitioner filed his bill in this honorable court, against C. D., for the purpose of [*state general object of original bill*], and praying [*state the prayer verbatim*].

And your petitioner further shows that the said C. D., being served with process of subpoena, appeared to the said bill, but has not yet put in his answer thereto. That after the appearance of the said defendant was entered, that is to say, on or about the — day of —, and before any further proceedings were had in the said cause [*state the supplemental matter*]; wherefore your petitioner is advised that it is necessary to bring the said C. H. W. before this court as a party defendant to this suit.

Your petitioner therefore prays that leave may be granted to him to file a supplemental bill against the said C. H. W., for the purpose of making him a party defendant to this suit with proper and apt words to charge him as such, and with such prayer for relief as may be proper, and for such other, etc.

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*Supplemental Bill.*

Complaining, sheweth unto your honor, your orator A. B., of, etc. That on or about, etc., your orator exhibited his original bill of complaint in this honorable court, against C. D., the defendant hereinafter named, as defendant thereto, thereby stating a certain memorandum of agreement, dated the 5th day of July, 1889, and made between E. W., therein described, of the one part, and your orator of the other part, and signed by the said E. W.,

whereby the said E. W. agreed to sell to your orator a certain lot or piece of land, called, etc., therein particularly described, and of which the said E. W. was seized in fee, for the sum of \$500; and further stating the delivery by the said E. W. of the abstract of his title, and the acceptance of such title by your orator; and further stating the death of the said E. W. intestate, and that he left the said J. W. his only son and heir at law; and that letters of administration of the estate and effects of the said E. W. had been granted by the surrogate of the county of — to the said J. W.; and further stating applications on the part of your orator to the said J. W. to perform the said agreement so entered into by his father as aforesaid, and his refusal to do so; and charging that the said lot or piece of land, called, etc., formed part of a considerable estate called Hesselstine, the whole of which had, before the date of the said contract for sale, been mortgaged by the said E. W. to one J. S. for \$12,000, which mortgage debt was still due and owing; and charging that the said E. W. would, if living, be bound to redeem the said mortgage, in order to convey the said lot or piece of land to your orator free from incumbrances, and that the said J. W. was bound to do so to the extent of his father's assets, which your orator charged were amply sufficient for the same; and praying that the said J. W. might be decreed specifically to perform the said agreement so entered into by the said E. W. as aforesaid, and to convey and procure all proper parties to join in conveying the said lot or piece of land comprised in the said agreement to your orator, or as he should direct, upon your orator paying to the said J. W. the sum of \$500, which your orator thereby offered to do, and in all respects to perform the said agreement on your orator's part; and in case the said J. W. should not admit assets of his said father sufficient to enable him to perform the said agreement, then that the usual accounts of the real and personal estate of the said E. W. might be taken; and that your orator might have such other or further relief in the premises as the circumstances of his case might require and to your honor should seem meet.

And your orator further sheweth unto your honor that the said J. W., being duly served with process of subpoena, appeared to your orator's said bill and put in his answer thereto, whereby he alleged, among other things, that he could not perform the said agreement of the 5th day of July, 1889, without first redeeming the said mortgage so made to the said J. S. as aforesaid, and that the assets of the said J. W. were not sufficient to enable him to do so.

And your orator further sheweth that the said answer has been replied to by your orator, and witnesses have been examined on both sides, but the proofs have not yet been closed; as by the said bill and proceedings, now remaining as of record in this honorable court, reference being had thereto, will appear.

And your orator further sheweth, by way of supplement, that your orator has lately, and since the examination of witnesses in the said cause, discovered, as the fact is, that the said J. S. now is and always since the date of the said agreement has been ready and willing to concur in conveying the said lot or piece of land to your orator discharged from his said mortgage, upon receiving your orator's purchase-money in discharge, *pro tanto*, of the said mortgage debt.

And your orator charges that such information was first given to your orator by means of a letter addressed by the said J. S. to Mr. L., your orator's solicitor, and dated, etc., part of which was in the words and figures following, that is to say:—"Mr. W.'s refusal to carry into effect his agreement with Mr. B. is unaccountable to me, because he knows that I have always been willing and even desirous to confirm the sale, and to release the premises from my mortgage on receiving the \$500 towards my debt. This in fact was understood between his father and myself at the time when the sale to Mr. B. was made;" as by such letter, reference being had thereto, will more fully appear.

And your orator charges, therefore, that it is unimportant whether the said J. W. has assets of his father sufficient to redeem the mortgage debt so due to the said J. S. as aforesaid, inasmuch as the said J. S. is willing to be partially redeemed, and the purchase-money of your orator is sufficient for that purpose.

And your orator charges that the said J. W. ought to be decreed to join with the said J. S. (whose concurrence your orator undertakes to procure) in conveying the said lot or piece of land to your orator, upon payment by your orator of the said sum of \$500 to the said J. S., in part discharge of his said mortgage debt.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may upon his corporal oath, according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid, as fully and explicitly as if the same were here repeated and he particularly interrogated thereto; and more especially that he may answer and set forth, in manner aforesaid, whether your orator did not, on or about, etc., or at some other and what time, exhibit his original bill of complaint in this honorable court against such person, and of or to such purport or effect as hereinbefore in that behalf stated, or against some other and what person, and of or to some other and what purport or effect, or how otherwise? And whether thereupon such proceedings were not had in the said cause as are hereinbefore in that behalf stated, or how otherwise? And whether your orator has not, since the examination of witnesses in the said cause, or at some other and what period, discovered, and whether it is not the fact that the said J. S. now is, and whether or not he always, since the date of the said agreement, has been, ready and willing to concur in conveying the said lot or piece of land to your orator, discharged from his said mortgage, upon receiving your orator's purchase-money in discharge, *pro tanto*, of the said mortgage debt, or how otherwise? And whether such information was not first given to your orator by means of such letter as hereinbefore in that behalf stated, or some other and what letter, or by some other and what means, or how otherwise, and when was such information first given to your orator? Whether such letter as is hereinbefore mentioned to bear date, etc., was not addressed by such person to such person, and whether it was not of such date, and partly in such words and figures, or of or to such purport or effect, as hereinbefore in that behalf stated, or addressed by some other and what person or persons, to some other and what person or persons, of some other and what date, and

(with respect to the part thereof hereinbefore in that behalf mentioned) in some other and what words and figures, or of or to some other and what purport or effect, or how otherwise? Whether it is not, and whether not for the reasons hereinbefore in that behalf given, unimportant, for the purposes of these suits, whether the said defendant has assets of his father sufficient to redeem the said mortgage debt, or how otherwise? And whether the said defendant ought not to be decreed to join with the said J. S. in such conveyance as hereinbefore in that behalf stated, or in some other conveyance of the same nature, upon such payment by your orator as hereinbefore in that behalf mentioned, or some other and what payment, or how otherwise; and if not, why not.

And that your orator may have the same relief against the said J. W. as he might have had if the facts hereinbefore stated and charged by way of supplement had been stated in your orator's said original bill. And in case the said defendant shall continue to allege that he has not assets of the said E. W. sufficient for the redemption of the mortgage debt so due to the said J. S. as aforesaid, then that he may be decreed to join with the said J. S. in conveying the said lot or piece of land comprised in the said agreement of the 5th day of July, 1889, unto your orator and his heirs, or as he shall direct, upon your orator paying to the said J. S. the said purchase-money or sum of \$500 towards the discharge of the said mortgage debt; your orator hereby offering to pay such sum, and in all respects to perform the said agreement of the 5th day of July, 1889, on his part, and also undertaking to procure the concurrence of the said J. S. in such conveyance as aforesaid; and that your orator may have such further or other relief in the premises as the circumstances of his case may require and to your honor shall seem meet. May it please, etc. [*process of subpoena*].

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*Præcipe for Subpœna ad Respondendum.*

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF NEW YORK.

JOHN DOE }  
vs. } IN EQUITY.  
RICHARD DOE }

*John A. Shields, Clerk Circuit Court, United States Southern District of  
New York:*

You will please issue a subpoena to the defendant Richard Roe in the above-entitled action, returnable on the first Monday of January, 1894.

JONES & SMITH, Solicitors for Complainant,  
120 Broadway, New York, N. Y.

Dated New York, December 2, 1893.



*Subpœna.*

THE PRESIDENT OF THE UNITED STATES OF AMERICA, *To Richard Roe,*  
GREETING:

You are hereby commanded that you, Richard Roe, personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of January, 1894, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by John Doe, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness, Honorable Melville W. Fuller, chief justice of the Supreme Court of the United States, at the city of New York, on the tenth day of December, in the year one thousand eight hundred and ninety-three, and of the independence of the United States of America the one hundred and seven-  
teenth.

JOHN A. SHIELDS, Clerk.

JONES & SMITH, Complainant's Solicitors,  
120 Broadway, New York, N. Y.

The defendant is required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of January, 1894, or the bill will be taken *pro confesso* against him.

JOHN A. SHIELDS, Clerk.

*Præcipe for Appearance.*

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF NEW YORK.

JOHN DOE }  
vs. } IN EQUITY.  
RICHARD DOE }

*To John A. Shields, Esq., Clerk of the United States Circuit Court for the Southern District of New York:*

You will please enter my appearance for the defendant Richard Roe in the above-entitled suit.

Yours, etc.,

WM. H. ELY, Solicitor for Defendant,  
120 Broadway, New York, N. Y.

New York, December 19, 1893.

*Præcipe for Appearance in Supreme Court.*

## SUPREME COURT OF THE UNITED STATES.

No. —. OCTOBER TERM, 1899.

JOHN JONES, Appellant, }  
                                   vs. }  
 RICHARD ROE, Respondent. }

The clerk will enter my appearance as counsel for the respondent.

GIDEON H. WELCH,

120 Broadway, New York, N. Y.

(Must be signed by a member of the bar of Supreme Court, United States.  
 Individual and not firm names must be signed.)

*Master's Warrant or Summons.*CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF NEW YORK.

JOHN JONES, Plaintiff, }  
                                   vs. } IN EQUITY.  
 RICHARD ROE, Defendant. }

In pursuance of the authority contained in a decretal order made in this cause by the Honorable William J. Wallace, circuit judge, and the Honorable Nathaniel Shipman, district judge, at a stated term of this court held at the United States court-house in the city of New York on the 2d day of July, A. D. 1898, I, Cornelius Dewey, one of the masters of said court, do hereby summon you, John Jones, complainant, and Richard Roe, to appear before me, the said Cornelius Dewey, at my office at No. 111 Broadway, in the city and county of New York, in the southern district of New York, on the 8d day of January, A. D. 1899, at 2 o'clock in the afternoon, to attend a hearing before me, the said master, of the matters in reference in the said cause to be had by virtue of the decretal order aforesaid. And hereof fail not at your peril.

CORNELIUS DEWEY, Master.

Dated the 28th day of December, 1898.

*Underwriting:* To take the account in the suit.

CORNELIUS DEWEY, Master.

To JOHN JONES and RICHARD ROE.

*Notice Accompanying Draft of Master's Report.*CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF NEW YORK.

JOHN JONES, Complainant,	}	IN EQUITY.
vs.		
RICHARD ROE, Defendant.	}	

SIRS:— You are hereby notified that I have prepared the draft of my report upon the matters referred to me as master, by the interlocutory decree herein dated the 30th day of November, 1887, and that a copy of such draft report accompanies and is annexed to this notice and is herewith served upon you; you are also hereby notified that I shall sign and file said draft report as my report herein, unless alterations are made by me therein, upon suggestions of counsel for either party hereto, and that I appoint the 19th day of February, 1894, at my office, room 10, No. 27 Wall street, in the city and county of New York, at 11 o'clock in the forenoon of said day, for counsel for either party hereto to present to me any suggestions of amendments to or alterations of said draft report, and to file with me written objections or exceptions thereto, if any they have to the same.

Yours, etc., CORNELIUS DEWEY, Master.

Dated New York, February 19, 1894.

To Messrs. COLT & HINE, Complainant's Solicitors, 1092 Broadway; and  
THOMAS BRADLEY, Defendant's Solicitor, 180 Broadway, New York City.

*Title and Commencement of a Demurrer.*

The demurrer of C. D., defendant, to the bill of complaint of A. B., the above-named plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer sheweth that, etc. [*Here set forth the cause of demurrer.*]

*Conclusion of a Demurrer.*

Wherefore and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

A. B.

[*Counsel's name.*]

*General Demurrer for Want of Equity.*

The demurrer of C. D., defendant, to the bill of complaint of A. B., complainant.

This defendant [*or, these defendants respectively*], by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, doth [*or, do*] demur thereto, and for cause of demurrer sheweth [*or, show*] that the said complainant hath not, in and by said bill, made or stated such a cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from or against this defendant [*or, these defendants*]; wherefore this defendant [*or, these defendants*] demand the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

L. M., Solicitor for Defendant  
G. H., of Counsel.

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*Demurrer for Want of Parties.*

The demurrer of C. D., defendant, to the bill of complaint of A. B., complainant.

This defendant [*or, these defendants respectively*], by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, doth [*or, do*] demur thereto, and for cause of demurrer sheweth [*or, show*] that it appears by the said complainant's said bill that H. L., therein named, is a necessary party to said bill, inasmuch as it is therein stated that F. G., the testator in the said bill named, did in his life-time, by certain conveyances made to the said H. L. in consideration of the sum of \$—, convey to him, by way of mortgage, certain estates in the said bill particularly mentioned and described, for the purpose of paying the said testator's debts and legacies, but the said complainant hath not made the said H. L. a party to the said bill. Wherefore [*as in the preceding form*].

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*Demurrer for Multifariousness.*

The demurrer of, etc.

This defendant, by protestation, etc. [*as in the preceding form*], doth demur, and for cause of demurrer sheweth, that it appears by the said bill that the same is exhibited against the defendant and the several other persons therein named as defendants thereto for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious. Wherefore, etc. [*as in the last form but one*].

*Demurrer on the Ground of the Statute of Frauds.*

[Commence as in the preceding form.]

That it appears by the said bill that neither the promise or contract which is alleged by the said bill, and of which the plaintiff by the said bill seeks to have the benefit, nor any memorandum or note thereof, was ever reduced into writing or signed by this defendant [or, these defendants or either (any) of them], or any person authorized thereunto, within the meaning of the statute passed in the twenty-ninth year of King Charles the Second [or, of chapter 105 of the General Statutes of Massachusetts] for the prevention of frauds and perjuries.

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*Demurrer Omitting Several Grounds — Certificate and Affidavit.*

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF NEW YORK.

JOHN JONES	} IN EQUITY.
vs.	
THOMAS BROWN and JAMES MONROE	

The demurrer of the above-named defendant, Thomas Brown, to the bill of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said bill. And for causes of demurrer sheweth,

I. That it appeareth by the plaintiff's own showing by the said bill that he is not entitled to the relief prayed by the bill against this defendant.

II. That it appears by the said bill that there are divers other persons who are necessary parties to the said bill, but who are not made parties thereto. And in particular it appears that the said Thomas Brown has been duly adjudicated a bankrupt, and that Richard Roe has been duly appointed assignee of his estate, and that it appears by the said bill that said Richard Roe as assignee as aforesaid is a necessary party to the said bill; but that said Richard Roe is not made a party thereto.

III. That the said bill is exhibited against these defendants, and against several others defendants to the said bill, for several and distinct and independent matters and causes which have no relation to each other, and in which or in the greater part of which this defendant is in no way interested or concerned, and ought not to be implicated.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto. And he prays the judgment of this honorable court whether he shall be compelled to make any

answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

WILLIAM MURRAY,

Solicitor and of Counsel for Defendant Thomas Brown,  
120 Broadway, New York.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

WILLIAM MURRAY,

Of Counsel for Defendant Thomas Brown.

New York, April 1, 1894.

STATE OF NEW YORK, }  
City and County of New York, } ss.  
Southern District of New York. }

Thomas Brown, being duly sworn, deposes and says:—I am one of the above-named defendants. The foregoing demurrer is not interposed for delay.

THOMAS BROWN.

Sworn to before me this 9th day of August, 1899.

[SEAL.]

GEORGE GASCOIGNE,

Notary Public, New York Co., N. Y.

### *Demurrer to Part of Bill Only.*

The demurrer of, etc.

This defendant [or, these defendants respectively], by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged as to so much and to such parts of the said bill as seeks that this defendant may answer and set forth whether, etc.; and whether, etc.; and prays [*if relief be prayed*], doth demur, and for cause of demurrer sheweth that [*state causes of demurrer*]. Wherefore, and for divers other errors and imperfections appearing in the said bill, the defendant prays the judgment of this honorable court whether he shall be compelled to make any answer to such part of the said bill as is so demurred unto as aforesaid, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

L. M., Solicitor for Defendant.

G. M., of Counsel.

### *Demurrer and Answer.*

The joint and several demurrer of A. B. and C. D. to *part*, and the joint and several answer of the same defendants to the *residue*, of the original bill of complaint of F. A. R. and E. G., plaintiffs.

These defendants, to so much of the plaintiffs' bill as prays that they may be decreed to transfer to the said plaintiffs, as the executors of M. L. in the said bill mentioned, the 21-64th shares of the ship called, etc., in the said bill mentioned, and that the said defendant C. D. may be decreed to transfer to the plaintiffs the 21-64th shares of the brig or vessel called, etc., in the said bill mentioned, and to so much of the said bill as prays that an account may

be decreed to be taken of all the dealings and transactions between these defendants and the said M. L. with respect or in relation to the said two vessels, and of all sums of money respectively received and paid by these defendants and the said M. L. respectively, or by any other person by their or any of their respective order, or for their or any of their use, and that these defendants should be decreed to pay what should be found due thereon, so far as such dealings and transactions and sums of money, or any or either of them, relate to or concern the said 31-64th shares of the said vessel called, etc., or the said 31-64th shares of the said vessel called, etc., and the freights or freight, or any shares or share of the freights or freight, of such vessels or either of them, and to so much of the said bill as prays further or other relief with respect or in relation to the said shares of the said two vessels respectively or the freight thereof respectively.

*Cause of demurrer.*] These defendants do demur, and for cause of demurrer show that the said plaintiffs have not made or stated such a case as entitles them in a court of equity to the relief so prayed for, or any part thereof; and these defendants humbly pray the judgment of the court as to such parts of the bill as they have so demurred to as aforesaid.

*Answer to residue of bill.*] And as to the residue of the said bill, that is to say, all the discovery, and the rest of the relief, by the said bill prayed, these defendants for answer thereto severally say, they admit it to be true that Messrs. G. & S. were, in the month of, etc., engaged in building at Liverpool, on their own account, a certain brig or vessel, and that in the month of, etc., these defendants A. B. and C. D. did carry on business together in partnership as wine merchants and general dealers, etc., etc.

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### *Demurrer to a Bill of Interpleader.*

The demurrer of, etc.

This defendant, by protestation, etc., doth demur in law to the said bill, and for cause of demurrer sheweth that, although the said plaintiff's said bill is upon the face thereof a bill of interpleader, yet the said plaintiff has not annexed to his said bill an affidavit that he doth not collude concerning such matters with any of the defendants thereto, which affidavit ought, according to the rules of this court, as this defendant is advised, to have been made by the said plaintiff and annexed to the said bill; and for further cause of demurrer this defendant further sheweth that the said bill does not contain sufficient matter of equity whereupon this court can ground any decree in favor of the said plaintiff, or give the said plaintiff any relief against this defendant. Wherefore, etc.

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### *Another Demurrer to a Bill of Interpleader.*

The demurrer of, etc.

This defendant, by protestation, etc., doth demur, and for cause of demurrer sheweth that the plaintiff has not in his said bill of interpleader shown any claim or right, title or interest whatsoever in this defendant in

or to the said estate called A., in the said bill particularly mentioned and described, in respect whereof this defendant ought to be compelled to interplead with C. D., in the said bill named, and the other defendant thereto. Wherefore, etc.

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### *Demurrer to Bill of Review.*

The demurrer of C. D., defendant, to the bill of review of A. B., complainant.

[Commencement as on p. 1308, *supra*.]

That by the constant rules of this court no bill of review ought to be admitted to alter or change matters decreed, only for error in law appearing in the body of the decree as it is drawn up and enrolled, or for new matter arising since the decree, or such matter of which the complainant in the bill of review could not have notice at the time of the decree; but this defendant is advised that the matters assigned by the said bill of review for cause of reversal of the said decree, as the same thereby appear by said complainant's bill, are neither any error in law apparent in the body of this decree, nor any such new matter as aforesaid, but a misjudgment in matters of form only, and not in point of right; and that the statement contained in the said bill of review of the abatement of the suit before the decree passed is merely an exception in point of form. Wherefore, etc.

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### *Demurrer to a Bill of Review and Supplemental Bill.*

These defendants, by protestation, etc., do demur in law thereto, and for cause of demurrer show that there are no errors in the record and premises, and in the decree of the — day of —, in the said bill of review and supplemental bill mentioned, nor is there any sufficient matter alleged in the said bill of review and supplemental bill to entitle the said plaintiff to reverse the said decree; and for divers other defects and errors appearing in the said bill of review and supplemental bill, these defendants do demur in law thereto; and these defendants, for further cause of demurrer, humbly show that, under the rules of this honorable court, no supplemental or new bill in the nature of a bill of review, grounded upon any new matter discovered or pretended to be discovered since the pronouncing of any decree of this court, in order to the reversing or varying of such decree, shall be exhibited without the special leave of the court first obtained for that purpose; wherefore, and for that the said plaintiff does not allege by the said bill of review and supplemental or new bill that he had first obtained leave of this court for exhibiting the said bill of review and supplemental or new bill, these defendants demur in law thereto, and humbly pray the judgment of the court whether they ought to be compelled to put in any further or other answer to the said plaintiff's said bill of review and supplemental or new bill, and humbly pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.



*Demurrer to Supplemental Bill.*

The demurrer of C. D., defendant, to the supplemental bill of A. B., complainant.

This defendant [*as in general demurrer at p. 1308, supra*]; that this defendant, as appears by the said supplemental bill, is not a party to the original bill therein in part stated and set forth; nor does it appear by the said supplemental bill that any new matter has or is pretended to have arisen since the said original bill was filed, or that there is any reason why this defendant should not, if necessary, be made a party thereto by amendment. Wherefore, etc. [*conclude as in general demurrer at p. 1309, supra*].

*Plea, Certificate and Affidavit.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
SOUTHERN DISTRICT OF NEW YORK.

Between JOHN JONES, Plaintiff,	}	IN EQUITY.
and		
ROBERT ROE and RICHARD DOE, De- fendants.		

The plea of the above-named defendant Richard Doe to the bill of complaint of the above-named plaintiff.

I, the defendant Richard Doe, by protestation, not confessing or acknowledging all or any part of the matters or things in the said bill of complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto, and for plea say that I am not the administrator of the estate of Mary Doe as in the said bill alleged, and that the administrator of said Mary Doe is one Charles Borden, which said administrator ought to be made a party or parties to the said bill, as I am advised; all which matters and things I aver to be true, and plead the same to the said bill, and humbly crave the judgment of this honorable court whether I ought to be compelled to make any further or other answer to the said bill.

SAMUEL B. HORNE,

Solicitor and of Counsel for Defendant Richard Doe,  
120 Broadway, New York.

I hereby certify that the foregoing plea is in my opinion well founded in point of law. New York, August 9, 1889. SAMUEL B. HORNE,

Of Counsel for Defendant Richard Doe.

STATE OF NEW YORK,  
City and County of New York, } ss.  
Southern District of New York.

Richard Doe, being duly sworn, deposes and says:—I am one of the above-named defendants. The foregoing plea is true in point of fact, and is not interposed for delay.

Sworn to before me this 9th day of August, 1889.

RICHARD DOE.

[SEAL.] GEORGE GASCOIGNE,

Notary Public, N. Y. C.

*Plea to Part, and Answer to Residue of Bill.*

The plea of — —, defendant [or, one of the defendants], to part, and the answer of the same defendant to the residue, of the bill of complaint of — —, plaintiff [or, the joint plea and answer, or, the joint and several plea and answer, *according to circumstances*].

This defendant, to all the relief sought by the said bill, and also to all the discovery thereby sought, except the discovery sought by or in respect of [so much of the said bill as prays that this defendant may answer and set forth] whether, etc. [*here the language of the interrogatories which it is necessary to answer must be introduced*], this defendant does plead in bar, and for plea saith, etc. [*here follows the plea*].

All which matters and things this defendant does aver to be true, and does plead the same in bar to the whole of the said bill, except such part of the discovery thereby sought as aforesaid; and this defendant humbly prays the judgment of this honorable court whether he ought to be compelled to make any further or other answer to so much of the said bill as is hereby pleaded to, and he prays to be hence dismissed with his costs.

And for answer to such parts of the said bill as are excepted this defendant says that, etc. [*here the answer follows*]. [Counsel's signature.]

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*Plea of Want of Interest of Defendant.*

[*Title as on p. 338, supra.*]

As to so much of and such parts of the plaintiff's bill as charges that this defendant is interested in the personal estate of A. B., the testator in the said bill named, and seeks an account of the said testator's personal estate, this defendant pleads thereto, and for plea saith that he is merely a subscribing witness to said testator's will, and in no wise interested therein; and this defendant avers that he has not, nor ever had, or pretended to have, nor does he or did he ever claim any right, title or interest whatsoever in the personal estate of the said testator, or any part thereof, and that the said plaintiff has no right to institute this or any other suit against him in respect thereof. All which said matters and things this defendant doth aver and plead in bar to so much of the said plaintiff's bill as hereinbefore particularly mentioned and pleaded to. And this defendant, not waiving his said plea, but relying thereon, and for better supporting the same, for answer to so much of the said bill as aforesaid, saith he denies that he now is, or ever was, interested in the personal estate of the said testator or any part thereof.

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*Plea of Former Suit Depending.*

[*Title as on p. 338, supra.*]

That at a term of the — court —, which was held in the year —, the said present plaintiff exhibited his bill of complaint in this honorable court against this defendant and one M. N. for an account of the moneys raised

by the sale of the plantations and other estates in the said plaintiff's present bill mentioned, and claiming such shares and proportions thereof, and such rights and interests therein, as he now claims by his present bill; and praying relief against this defendant in the same manner, and for the same matters, and to the same effect, as the said plaintiff now prays by his said present bill; and this defendant and the said M. N. appeared and put in their answer to the said former bill, and the said plaintiff replied thereto, and witnesses were examined on both sides, and their depositions duly published, and the said former bill and the several proceedings in the said former cause, as this defendant avers, now remain depending, and as of record in this honorable court, the said cause being yet undetermined and undismissed; all which several matters and things this defendant doth aver, and pleads the said former bill, answer, and the several proceedings in the said former suit, in bar to the said plaintiff's present bill; and humbly demands the judgment of this honorable court whether he shall be put to make any further or other answer thereto; and prays to be hence dismissed with his costs and charges in this behalf sustained.

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### *Plea of Stated Account.*

[Title as at p. 338, *supra*.]

As to so much and such parts of the said plaintiff's bill as seeks an account of and concerning the dealings and transactions therein alleged to have taken place between the said plaintiff and this defendant, at any time before the — day of —, in the year —, this defendant for plea thereto saith that on the — day of —, which was previously to the said bill of complaint being filed, the said plaintiff and this defendant did make up, state and settle an account in *writing*, a counterpart whereof was then delivered to the said plaintiff, of all sums of money which this defendant had before that time, by the order and direction and for the use of the said plaintiff, received, and of all matters and things thereunto relating, or at any time before the said — day of — being or depending between the said plaintiff and this defendant (and in respect whereof the said plaintiff's bill of complaint has been since filed), and the said plaintiff, after a strict examination of the said account, and every item and particular thereof, which this defendant avers according to his best knowledge and belief to be true and just, did approve and allow the same, and actually received from this defendant the sum of \$—, the balance of the said account, which by the said account appeared to be justly due to him from this defendant; and the said plaintiff thereupon, and on the — day of —, gave to this defendant a receipt or acquittance for the same, under his hand, in full of all demands, and which said receipt or acquittance is in the words and figures following (that is to say), [*here state the receipt verbatim*], as by the said receipt or acquittance, now in the possession of this defendant, and ready to be produced to this honorable court, will appear. Therefore, etc.

*Plea to a Supplemental Bill.*

[Title as at p. 338, *supra*.]

That the several matters and things in the said complainant's present bill stated and set forth by way of supplement arose and were well known to the said complainant before and at the time the said complainant filed his original bill in this cause; and that such said several matters and things can now be introduced and ought so to be, if necessary, by amending the said original bill. Wherefore, etc.

*Plea to a Bill of Revivor.*

[Title as at p. 338, *supra*.]

That the said plaintiff is not, as stated in the said bill of revivor, the personal representative of A. B., deceased, the testator therein named, and as such entitled to revive the said suit in the said bill of revivor mentioned against this defendant; but the said plaintiff is the administrator only of C. D., late of, etc., deceased, who died intestate on the — day of — last, and was the sole executor of the said A. B.; and that letters of administration of the goods and estate of the said A. B., unadministered by the said C. D. in his life-time, have, since the death of the said C. D., been duly granted by the proper court to E. F., of, etc., who thereby became, and now is, the legal personal representative of the said A. B.

Wherefore the said defendant demands the judgment of this honorable court whether he shall be compelled to answer the said plaintiff's bill, and humbly prays to be dismissed with his reasonable costs in this behalf sustained.

*Commencement of Separate Answer of Wife.*

The answer of C. B., one of the above-named defendants, and the wife of [the defendant] A. B., to the bill, etc.

In answer to the said bill, I, C. B., answering separately from my husband, in pursuance of an order of this honorable court, dated the — day of —, 18—, authorizing me so to do, say as follows: —

*Answer and Oath.*

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF NEW YORK.

FREDERICK FRANCIS and JOSEPH	}	IN EQUITY.
CANTON		
vs.		
JOHN HESTER.		

The answer of the above-named defendant to the bill of complaint of the above-named plaintiffs.

In answer to the said bill, I, John Hester, say as follows:—

1. I admit that I was on the 1st day of June, 1864, seized in fee-simple of the premises in the first paragraph of the said bill mentioned. And I admit

that the indenture in the said first paragraph of the said bill mentioned was of such date, and made between such parties, as in the first said paragraph of the said bill alleged, and that the same was executed by me. I believe that the said indenture was not executed by Charles Ames in the said bill mentioned. I believe that the said indenture was of or to the purport and effect in the said first paragraph of the said bill in that behalf set forth; but for my greater certainty I crave to refer to the same when produced to this honorable court.

2. I do not know and cannot set forth as to my belief or otherwise whether the said Charles Ames died on the 7th day of May, 1867, or when he died; or whether or not having by his will and whether or not dated the 10th day of January, 1867, or of what other date, devised to the plaintiffs and their heirs all estates vested in him by way of mortgage, or appointed the plaintiffs to be his executors; nor whether the said will was or not on the 1st day of July, 1867, or when, in fact, proved by the plaintiffs in the surrogate's court for the city and county of New York, or how otherwise; nor whether the said plaintiffs thereby or in fact became, nor whether they now are, the legal personal representatives of the said Charles Ames; but I have no reason to doubt that the facts are as in that behalf alleged in the said bill.

3. The said Charles Ames was a bachelor, without any near relations, and for many years previously to the year 1864, and thenceforward to his death, he suffered from continued ill health and infirmity. My mother, Sarah Hester, was in the service of the said Charles Ames as housekeeper from the year 1855 down to the time of the death of the said Charles Ames, and was in continual attendance upon him; and the said Charles Ames frequently expressed to my said mother his gratitude for her attention to his comfort in that his illness.

4. I attained my age of twenty-one years in the year 1864. In the early part of that year my said mother applied to the said Charles Ames to advance me the sum of one thousand dollars to enable me to enter business, which he agreed to do on having the repayment thereof with interest secured by the said indenture of the 1st day of June, 1864.

5. In the month of May, 1864, the said Charles Ames wrote, signed, and sent to me a letter bearing no date, containing the words and figures following (that is to say):— "All is arranged about the security you are to give me. I hope I shall never have occasion to enforce it; and that nothing will compel me to change my intention of rewarding your mother and yourself for her long and faithful services to me,"—as by such letter when produced will appear.

6. I have never made any payments whatsoever on account of interest due on the said indenture, and I was never called upon to pay interest thereon by the said Charles Ames in his life-time.

7. My said mother died on the 27th day of December, 1867.

8. Under the circumstances hereinbefore appearing I submit that nothing is due on the said indenture from me to the plaintiffs, whether as such alleged personal representatives or otherwise, but I admit that nothing has ever been paid on account of the principal money secured thereby.

9. I do not know, and cannot set forth, as to my belief or otherwise, whether the plaintiffs did on the 7th day of April, 1878, discover, but I ad-

mit that it is the fact that I intend to pull down the said house in the said bill mentioned, and that I have advertised the bricks composing the same to be sold as building materials. I deny that it is true that I have entered into a contract with James Alldis or with any other person for the execution of the work of pulling down the same.

10. I admit that if the said house be pulled down the said premises would be an insufficient security for the sum of \$1,000 with interest thereon at the rate of five per centum per annum from the 1st day of June, 1864. But I submit that I have a right to pull down the said house, and to sell the bricks composing the same as building materials, and that the injunction awarded against me by this honorable court on the 16th day of April, 1878, ought to be dissolved, and that the said bill ought to be dismissed with costs.

JOHN HESTER.

WELLINGTON B. SMITH,  
Solicitor for John Hester,  
190 Broadway, New York.

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*Defendant's Oath to Answer.*

STATE OF NEW YORK, }  
City and County of New York, }  
Southern District of New York. }

John Hester, being duly sworn, deposes and says:—I am the above-named defendant. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons, I believe to be true.

JOHN HESTER.

Sworn to before me this 20th day of July, 1875.  
[SEAL.] GEORGE GASCOIGNE,  
Notary Public, New York County.

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*Replication.*

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF NEW YORK.

JOHN JONES, Plaintiff, }  
vs. }  
JOHN DOE and RICHARD ROE, De- }  
fendants. }

This repliant, John Jones, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto saith that he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in the law to be

answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

JOHN H. HUBBARD,  
Solicitor for Plaintiff,  
120 Broadway, New York.

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*Petition by Infant for Appointment of a Guardian ad Litem.*

[Title of cause.]

To the Chancellor, etc.:—

The petition of C. D., of —, the [or, a] defendant in this suit, respectfully sheweth that your petitioner is an infant over the age of fourteen years, to wit, of the age of fifteen years and upwards; that the bill in this cause was filed against your petitioner [and others] for the foreclosure of a mortgage alleged to have been executed by the father of your petitioner (who is now deceased), in his life-time, to the complainant, and praying for a sale of the mortgaged premises. And your petitioner further shows that she claims an interest in the said mortgaged premises as heir-at-law of her father; and that she has been served with a subpoena in said cause requiring her to appear and answer the said bill, returnable on the — day of — instant.

Your petitioner therefore prays that L. M., a solicitor of this court residing in —, may be appointed the guardian *ad litem* of your petitioner, to appear and defend this suit on her behalf. And your petitioner will ever pray, etc.

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*Petition by Complainant for Appointment of a Guardian ad Litem for an Infant Defendant.*

[Commence as in preceding form.]

The petition of A. B., the complainant in this suit, respectfully sheweth that the bill in this suit was filed against the defendant to foreclose a mortgage executed by the father of said defendant (who is now deceased), in his life-time, to your petitioner, and praying for a sale of the mortgaged premises; and that the said defendant claims an interest in the said premises as heir-at-law of her father. And your petitioner further shows that the said C. D. resides in —, and is, as he is informed and believes, an infant over the age of fourteen years, to wit, of the age of fifteen years and upwards. And that on the — day of —, a subpoena in this cause was duly served on the said C. D. requiring her to appear to and answer the said bill, re-

turnable on the — day of — last. And your petitioner further shows that although more than — days have elapsed since the appearance day mentioned in said subpoena, no guardian *ad litem* hath as yet been appointed for such infant, or applied for by her or by any person on her behalf, to the knowledge or belief of your petitioner.

Your petitioner therefore prays that L. M., the register of this court, may be appointed guardian *ad litem* of such infant defendant, to appear and defend this suit in her behalf.

And your petitioner, etc.

*Petition for Removal from a State Court to a Circuit Court  
of the United States.*

SUPREME COURT, COUNTY OF NEW YORK.

JOHN JONES, Plaintiff, }  
                                  us. }  
ROBERT ROE, Defendant. }

*To the Honorable the Supreme Court of the State of New York, held in and  
for the County of New York:*

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the controversy in said suit is between citizens of different States, and that your petitioner, the defendant in the above-entitled suit, was at the time of the commencement of the suit, and still is, a resident of and a citizen of the city of Boston, in the county of Middlesex, in the State of Massachusetts, and a non-resident of the State of New York, and that the plaintiff, John Jones, was then, and still is, a resident and citizen of the city, county and State of New York.

And your petitioner offers herewith a good and sufficient surety for his entering in the circuit court of the United States for the southern district of New York, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the southern district of New York; and he will ever pray.

JAMES LONDON.

SMITH & BEERS, Petitioner's Attorneys,  
211 Broadway, New York, N. Y.

CITY AND COUNTY OF NEW YORK.

Robert Roe deposes and says:— I am the above-named petitioner. The foregoing petition is true to my own knowledge, except as to the matters



therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

ROBERT ROE.

Sworn to before me this 18th day of December, 1899.

[L. S.] GEORGE GASCOIGNE, Notary Public,  
New York County.

On this 18th day of December, 1899, in the city and county of New York, before me, a notary public in and for the city and county of New York, personally appeared Robert Roe, to me known to be the individual who executed the foregoing petition, and then and there acknowledged to me that he had executed the same.

[L. S.] GEORGE GASCOIGNE, Notary Public,  
New York County.

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### *Bond on Removal.*

*Know all Men by these Presents*, that Robert Roe, of Boston, Massachusetts, as principal, and James Martin as surety, are holden and stand firmly bound unto John Jones in the penal sum of one thousand dollars, for the payment whereof well and truly to be made unto the said John Jones, his heirs, representatives and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally firmly by these presents.

Upon condition, nevertheless, that whereas the said Robert Roe has petitioned the Supreme Court of the State of New York, held in and for the county of New York, for the removal of a certain cause therein pending, wherein the said John Jones is plaintiff and the said Robert Roe is defendant, to the circuit court of the United States in and for the southern district of New York:—

Now, if the said Robert Roe shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof the said Robert Roe and James Martin have hereunto set their hands and seals this 15th day of December, A. D. 1898.

ROBERT ROE. [L. S.]

JAMES MARTIN. [L. S.]

### **CITY AND COUNTY OF NEW YORK.**

James Martin, being duly sworn, deposes and says:—I reside in the city, county and State of New York, and am a freeholder therein; and am worth the sum of two thousand dollars over and above all property exempt from sale on execution.

JAMES MARTIN.

Sworn to before me this 18th day of December, 1899.

[SEAL.] GEORGE GASCOIGNE,  
Notary Public, New York County.

On this 18th day of December, 1899, in the city and county of New York, before me, a notary public in and for the city and county of New York,

personally appeared the above-named Robert Roe, of Boston, Massachusetts, and James Martin, of the city and county of New York, both of whom are to me known, and known to me to be the individuals described in and who executed the foregoing instrument, and then and there each of them severally acknowledged that he had executed the foregoing bond.

[SEAL.]      GEORGE GASCOIGNE,  
Notary Public, New York County.  
Approved by GEORGE C. BARRETT, J. S. C.

*Notice of Deposition under United States Revised Statutes.*

UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT  
OF NEW YORK.

JOHN JONES, Plaintiff,  
vs.  
THOMAS MOWERAY, Defendant. } IN EQUITY.

Please take notice that the complainant herein will take the testimony of John Jones, Charles Hanchett and Emery Fenn, all of whom reside at the city of New York, and State of New York, and others, each and all of whom reside more than one hundred (100) miles from the place of trial herein, and more than one hundred (100) miles from any place at which a circuit court of the United States for the northern district of New York is appointed to be held by law, at the final hearing for use on behalf of the complainant, before Walter S. Judd, Esq., a notary public in and for the city and county of New York, who is not of counsel nor interested in this cause, at the office of Smith & Brown, at No. 27 Wall street, in the said city of New York, and State of New York, on the 8d day of January, 1893, at 11 o'clock A. M., and thereafter from day to day as the taking of the depositions may be adjourned; and such testimony will be so taken in accordance with the provisions of sections 863, 864 and 865 of the Revised Statutes of the United States and the equity rules.

SMITH & BROWN,  
Complainant's Solicitors,  
No. 27 Wall Street, New York.

Dated New York, December 28, 1892.  
To HENRY POOLE, Esq., Defendant's Solicitor,  
No. 877 Elm Street, Albany, New York.

*Notice of Taking Testimony in Equity.*

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF NEW YORK.

JOHN JONES, Complainant,  
vs.  
RICHARD ROE, Defendant. } IN EQUITY.

Notice is hereby given that we shall proceed to take proofs for final hearing on the part of the complainant under the sixty-seventh rule of the

Supreme Court for courts in equity, as amended, or in accordance with the statutes in such case made and provided, and in pursuance of the rules and practice of this court, orally before Donald T. Warner, an examiner of this court, or some other proper officer, under said statutes and rules, at room 27, Number 210, Broadway, New York, on the 9th day of May, 1894, at 11 o'clock in the forenoon.

The names and residences of the witnesses who live at a greater distance from the place of trial than one hundred miles, whom it is intended to examine, are stated below.

You are invited to attend and cross-examine any witnesses produced. The examination will be adjourned from day to day, and to such time and place as may be required, without further notice.

JONES & SMITH,

Complainant's Solicitors,

No. 210 Broadway, New York.

Dated New York City, July 1, 1893.

To HENRY TERRILL, Esq.,

Solicitor for Defendant.

Names of witnesses and residences:—

John Hart, of Binghamton, New York.

Charles Blake, of Hartford, Connecticut.

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### *Letters Rogatory.*

UNITED STATES,  
District of Pennsylvania. } ss.

THE PRESIDENT OF THE UNITED STATES, *To any Judge or Tribunal having jurisdiction of civil causes at Havana*, GREETING:

Whereas, a certain suit is pending before us in which John D. Nelson, Henry Abbott and Joseph E. Tatem are the claimants of the schooner *Perseverance* and cargo, and the United States of America are the defendants; and it has been suggested to us that there are witnesses residing within your jurisdiction without whose testimony justice cannot completely be done between the said parties:—

We therefore request you that in furtherance of justice you will, by the proper and usual process of your court, cause such witness or witnesses as shall be named or pointed out to you by the said parties, or either of them, to appear before you or some competent person by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, and there to answer on their oaths and affirmations to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing and returned to us under cover, duly closed and sealed up together with these presents. And we shall be ready and willing to do the same for you in a similar case when required.

Witness, etc.

*Letters Rogatory.*

UNITED STATES OF AMERICA. }  
 Southern District of New York. }

THE PRESIDENT OF THE UNITED STATES OF AMERICA, *To the President of the Court at S. Angelo dei Lombardie in the Kingdom of Italy*, GREETING:

Whereas a certain suit is pending in our circuit court for the southern district of New York, in which Giovanni P. Riva, as administrator of the estate of Angelo di Nicola, deceased, is plaintiff, and the New York Central and Hudson River Railroad Company is defendant, and it has been suggested to us that justice cannot completely be done between the said parties without the testimony of Grazia Di Ventuto, Antonio Torrello and Maria Michela Torrello, all of whom reside at Bagnoli Irpino, within your jurisdiction:—

We therefore request you that in furtherance of justice you will, by the proper and usual process of your court, cause said Grazia Di Ventuto, Antonio Torrello and Maria Michela Torrello to appear before you or some competent person by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, then and there to make answer on their oaths and affirmations to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing and to be returned to us under cover, addressed to the clerk of the circuit court of the United States for the southern district of New York, at the city of New York and State of New York, in the United States of America, duly closed and sealed up together with these presents, and we shall be ready and willing to do the same for you in a similar case when required.

Witness, Hon. Melville W. Fuller, chief justice of the Supreme Court of the United States, at the city of New York, the 24th day of December, in the year of our Lord 1891.

JOHN A. SHIELDS, Clerk. [L. S.]

*Order for Dedimus Potestatem.*

AT A STATED TERM OF THE UNITED STATES DISTRICT COURT  
 HELD AT THE UNITED STATES COURT BUILDING IN THE  
 CITY OF NEW YORK, FOR THE SOUTHERN DISTRICT OF NEW  
 YORK, ON THE 18TH DAY OF APRIL, 1874.

Present: the Honorable SAMUEL BLATCHFORD, the District Judge.

THE UNITED STATES }  
 vs. }  
 S. N. WOLFF et al. }

On reading and filing affidavit of plaintiff's attorney and notice of motion, with proof of due service thereof on attorneys for the defendant, Alphense de Riesthal, who only has appeared herein, George Bliss, Esq., appearing

for the plaintiff, and W. J. A. Fuller, Esq., for the defendant, Alphonse de Riesthal:—

It is, on motion of George Bliss, Esq., United States attorney, ordered that a *dedimus potestatem* be issued in this cause out of this court, directed to the United States consul, and to such deputy or representative of said consul as may be authorized by him to act in his place and stead, at the following-named places, respectively, viz:—To E. P. Beauchamp, United States consul at Aix-la-Chapelle (Aachen), Germany, and his deputy or representative; to W. P. Webster, United States consul at Frankfort-on-the-Main, and his deputy or representative; to H. Kreisman, United States consul at Berlin, Prussia, and his deputy or representative; to J. S. Stuart, United States consul at Leipzig, Germany, and his deputy or representative; to Daniel McM. Gregg, United States consul at Prague, Austria, and his deputy or representative; to S. H. M. Byers, United States consul at Zurich, Switzerland, and his deputy or representative,—to examine the following-named persons under oath as witnesses herein, viz: A. Amberg, and the person or persons composing the firm of A. Hirsch & Co., of Cassel, Germany; S. N. Wolff, of Neidheim, near Cassel aforesaid; the person or persons composing the firm of Luttger Brothers, of Petersmuhle, near Solingen, Germany; Carl Aufermann, of Loesbach, near Liedenscheid, Germany; V. T. Pospichel, of Wiesenenthal, Bohemia; and the person or persons composing the firm of Leopold Czech & Co., of Haida, Bohemia; the person or persons comprising the firm of E. Kreimer & Co., Berlin, Prussia; W. Wagner, Jr., of Plattenberg, Switzerland, and T. L. Lurman, and J. W. Maes, of Iserlohn, Germany.

It is further ordered that the examination above provided for shall take place during the months of July and August, 1874, and at such times within said months as is hereinafter designated.

It is further ordered that either party to this action shall have liberty to examine not only the witnesses herein named, but any other witnesses that either party may desire to examine at the aforesaid places of Aix-la-Chapelle, Frankfort-on-the-Main, Berlin, Leipzig, Prague, or Zurich, before either of the persons herein authorized to take testimony; provided, however, that the names of said witnesses and their places of residence shall be given to the attorney of the opposite side in New York before June 6, 1874, or such notice be given in Europe to the opposite counsel acting there for either party to this action in either of the aforesaid places of Aix-la-Chapelle, Frankfort-on-the-Main, Berlin, Leipzig, Prague, or Zurich, where such other witnesses are to be examined two days before such examination.

It is further ordered that prior to June 6, 1874, the attorneys for the respective parties shall give notice in New York, each to the other, of the names and European address for the last week in June, 1874, of the counsel for the respective parties who are to take testimony under this commission.

It is further ordered that the examination of witnesses shall be had at the following places in the following order and not otherwise, viz:—First, at Aix-la-Chapelle, next at Frankfort-on-the-Main, next at Berlin, next at Leipzig, next at Prague, next at Zurich; that four weeks shall elapse between the examination of witnesses at Prague and Zurich; that the examination shall commence at Aix-la-Chapelle on the 6th day of July, 1874, or within two days thereafter; and that no examination shall be had of wit-

nesses at any place after the examination has been finished at that place, or the examination of witnesses commenced at another place.

It is further ordered that the counsel for the plaintiff shall have with him, at any and all said examinations of said witnesses or either of them, all the original invoices mentioned in the declaration herein, or copies or duplicates thereof, and which are in the possession of the plaintiff, and that counsel for defendant shall have full and free inspection thereof, and liberty to take copies of the same.

It is further ordered that all directions herein contained as to time, place, order and manner of examination of said witnesses may be changed or modified by the written consent of the counsel for the respective parties in Europe or in New York.

It is further ordered that the examination of all witnesses under this commission shall be oral or taken by question and answer in the usual manner of taking oral depositions by examination, cross-examination and redirect examination; that the testimony given under such examination shall be reduced to writing, signed by the witnesses and certified by the commissioners respectively, and by them transmitted by mail to the clerk of this court at the city of New York, unless otherwise mutually agreed upon by said counsel for both parties.

It is further ordered that all testimony taken under the commission provided for herein shall be taken subject to all legal objections at the trial of this action.

SAM. BLATCHFORD.

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### *Final Record in Equity.*

#### CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

JOHN JONES  
vs.  
ROBERT ROE. } IN EQUITY.

The complainant in the above-entitled cause filed his bill of complaint, which is hereunto annexed, on 2d day of January, 1887, and the writ of subpoena was thereupon issued, and returned personally served.

An appearance was duly entered for the defendant by Henry Smith, his solicitor, and on the first Monday of March thereafter an answer to said bill of complaint was filed, the same being hereto annexed.

On the first Monday of April thereafter, the complainant filed a replication, the same being hereto annexed.

On the 19th day of March, 1887, an order of the court granting to the complainant a preliminary injunction as prayed for in the bill of complaint was filed and entered, which said order is hereunto annexed.

Testimony was thereafter taken by the respective parties, and filed in the clerk's office of the said circuit court.

Afterwards, and at the October term of 1888 of said court, present the Honorable Nathaniel D. Shipman, district judge, the said cause came on to be heard on the pleadings and proofs, and was argued by counsel. On the

8d day of November, 1888, a decree of said court was filed and entered in favor of the complainant, by which it was adjudged that a perpetual injunction should issue against the defendant, and that an accounting be had before John A. Shields, master of said court; the said order being hereto annexed.

On the 9th day of June, 1889, the said master filed his report, upon which, and on the 11th day of October, 1889, the said court caused its final decree to be entered herein, the same being hereto annexed.

And the costs having been taxed by the clerk at seven hundred and fifty dollars, the process, pleadings and decrees, together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said John Jones recover of said Robert Roe the sum of two thousand dollars as adjudged in said final decree, together with the further sum of seven hundred and fifty dollars, the cost and charges as taxed, making in the aggregate the sum of two thousand seven hundred and fifty dollars.

Signed and enrolled this 15th day of November, A. D. 1889.

JOHN A. SHIELDS, Clerk.

*Decree for Specific Performance of Agreement for Policy of Insurance.*

OCTOBER TERM, 1888.

UNITED STATES CIRCUIT COURT, }  
Massachusetts District.

UNION M. INS. CO. }  
vs. }  
C. M. M. INS. CO. }

This case was thence continued from term to term until this present term; when, to wit, on the 14th day of November, A. D. 1888, the same came on to be heard on the bill and answer and proofs in the case, and was argued by counsel.

And it appearing to the court that the plaintiffs, through their agent, made a proposal in writing for insurance which contained all the necessary terms of a valid contract for a policy, and that the defendants accepted this proposal.

That this acceptance made a legal contract between the parties, which it is the duty of the court to order to be specifically performed.

That as it is admitted that the plaintiffs would have a good cause of action at law upon a policy, if issued in pursuance of the contract, there should be decreed to them in this suit what they would be entitled to recover if a policy were issued and that which was agreed to be done were actually done:—

Thereupon it is ordered, adjudged and decreed that the said agreement so entered into between the said plaintiffs and the said defendants set forth in the bill of complaint, and proven in this cause, be specifically performed.

It is further ordered, adjudged and decreed that the plaintiffs recover of the said defendants the sum of eight thousand seven hundred and two dollars and forty-three cents, as and for their damage in this behalf sustained, a deduction having been first made from the sum agreed to be issued for premium and salvage, and also the sum of two hundred and four dollars twenty-four cents, for their cost in this behalf sustained.

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*Decree Rescinding Contract for Fraud.*

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is declared by the court that the contract of sale, and the conveyance of the premises, and the notes of the said Daniel thereupon, as set forth in the bill, were made by and between the said Otis Daniel and the said James Todd and other parties, upon material representations and mutual mistakes as to the quantity of timber on the premises so sold, and therefore ought to be set aside, and held null and void; and the said Otis Daniel ought to be repaid the amount of the said purchase-money actually paid by him thereupon and therefor by the said Todd, who received the notes for the same, and in his aid and for his relief, by such of the other parties, defendants to the bill respectively, for whom the said Todd acted as agent, or who with a full knowledge of, and assent to, the said contract of sale and misrepresentations and mistakes, have received any of the said notes, or any part of the purchase-money paid thereon by the said Daniel; but not for the part thereof received by any other party. And thereupon, in furtherance of the declarations aforesaid, it is further ordered, adjudged and decreed that the same contract of sale, and conveyance and notes, be, and hereby are, annulled, rescinded and declared utterly void and of no effect.

And the said Otis Daniel is further ordered, adjudged and decreed to reconvey the premises by such due and reasonable conveyance or conveyances as shall be devised and reported by a master, when and so soon as the purchase-money actually paid by him shall be repaid as hereinafter mentioned.

And it is further ordered, adjudged and decreed by the court that the said James Todd be, and hereby is, held directly liable to the plaintiff for the whole amount of moneys paid as aforesaid, deducting, however, therefrom the proceeds of timber sold, as well as the value of timber taken from said lands by and under the authority of the said Otis Daniel, and remaining unsold, and making all due allowances for all proper charges and expenses incurred in regard to said timber, and for taxes paid on the said lands.

And it is further ordered, adjudged and decreed that such of the other parties, defendants to said bill, as with a full knowledge of the premises, or for whom the said Todd acted as agent, or who assented to the said contract of sale and conveyance, with a full knowledge of the premises, shall be, and hereby are, decreed to be liable in aid and relief of the said Todd, to pay and deliver back to the said Otis Daniel such parts or portions of the purchase-money paid by the said Daniel for the said lands as have been received by them respectively in the premises, or on the notes of the said Daniel so



received by them; but no one of them to be liable for any purchase-money or notes received by any of the other parties, defendants.

And it further ordered, adjudged and decreed by the court that no damage or interest on the aforesaid moneys be allowed, except the proceeds of such timber, sold and unsold, as aforesaid, shall furnish a fund therefor; and in that event, interest upon said purchase-money to be added thereto as an offset *pro tanto* to the excess of said proceeds not exceeding the amount of such excess.

And it is further ordered, adjudged and decreed by the court that it be referred to S. L. Esquire, as master, to ascertain the amount due to the plaintiff on the basis of this decree, and also the particular notes and sums received by each of said defendants of said purchase-money, so paid and secured as aforesaid, and to report the same to the court.

And it is further ordered, adjudged and decreed by the court that the master be clothed with full power to examine, as well the parties as any other witnesses, orally or upon written interrogatories, under oath, in the premises, and to require the production of all vouchers, papers and other documents pertinent and proper in the premises; and that he state a full account in the premises upon the basis of this decree. And that he be clothed with all the usual powers and authorities of a master in all things touching the premises.

And all further orders and decrees are reserved for the consideration of the court.

### *Decree Declaring Construction of Will.*

#### SUPREME JUDICIAL COURT.

BRISTOL — SS.

W. V.	}	IN EQUITY.
vs.		
J. B. and others.		

AT CHAMBERS IN BOSTON, March 8, 1869.

This cause came on to be heard at Boston on the 14th day of January, A. D. 1869, by adjournment from the October term of this court at Taunton, within and for our county of Bristol, in the year 1868, upon bill and answers, and was argued by counsel, and thereupon, after due consideration, this court is of opinion, and doth declare, that the provisions in the eighth article of the will of said W. V. have reference only to the bequests to the descendants of the testator's sister A. W.; and as the contingency on which the bequest of the residue to the descendants of said A. W. depended did not happen, the questions presented in this suit are not affected by that article; that by the third clause of the fourth article of the will, on the death of the testator's grandson W. V., Jr., one-half of the whole fund in the hands of the trustees vested in the children of the grandson, of whom the plaintiff is one; that on the death of C. E. V., one of the children of said grandson, the share of said C. E. V. went to his administrator, to be disposed of according to the statute of distributions, and that the plaintiff

iff is not entitled by this suit to recover of the trustees any portion of the estate of said C. E. V.; that after the death of the testator's grandson, the father of the plaintiff, the residuary fund ought to be divided into two equal parts, one-half part to be kept and managed by the trustees, for the benefit of the testator's granddaughter J. V. F., so far as the will allows, that is, to an annual amount not exceeding one-eighth of the income of that half, and the rest of such income to be invested with the principal, for the ultimate benefit of her issue, if they should become entitled to it; that the other half ought to be divided into five equal parts, one of which said fifth parts to be for each of the children of the testator's grandson, the father of the plaintiff, vesting in said children, in severalty, but to be retained and managed by the trustees until said children respectively come of age, or die, and subject under the will to different disbursements of income, according to the discretion of the trustees, for their support during their minority; that by the construction of the last two clauses of the fifth article of the will, the plaintiff, upon arriving at the age of twenty-one years, is entitled to receive from the trustees a conveyance of one-fifth of one-half of the residuary estate remaining in their hands, upon an account to be settled in the probate court, after first deducting the costs and expenses of all parties to this suit.

It is therefore ordered, adjudged and decreed that the trustees J. B. and P. D. B. do pay out of the residuary trust fund in their hands to the several parties to this suit, their costs and expenses of this suit, as agreed upon by all parties, as follows, to wit: — To B. F. T., of counsel for the plaintiff. W. V., the sum of twenty-five hundred and seventy-five dollars; to R. O., solicitor for the plaintiff, the sum of five hundred dollars; to E. C. A., solicitor and counsel for the trustees J. B. and P. D. B., the sum of one thousand and eighteen dollars; to P. H. S., solicitor and of counsel for J. V. F., J. A. F., J. V. T., C. B. T. and J. McL., guardian of H. A. F. and J. E. F., the sum of eleven hundred and fifty dollars; to J. C. B., solicitor and counsel for Jeff. B. V., Jessie B. V. and E. E. V., the sum to be allowed by the probate court in his guardian's account; and to W. W. C., solicitor and of counsel for M. A. R. and W. S. R., the sum of five hundred dollars; and that the trustees pay the fees of the clerk of the court, taxed at one hundred and twenty dollars and twenty cents; and that upon their account being rendered to, and allowed by, the probate court for the county of Bristol (in case the parties do not otherwise agree upon the matter), the trustees J. B. and P. D. B. do, and they hereby are required and directed to, pay and convey to the plaintiff W. V. one-fifth of one-half of the said residuary trust fund and estate remaining in their hands, after deducting said costs and expenses of suit and such reasonable allowances as may be made to the said trustees in said account; and said trustees are required forthwith to make return or report of the manner in which they shall have executed this order and decree to this court for approbation and confirmation of their doings thereon, and the cause is to stand continued until the coming in of such their return or report.

E. R. H., J. S. J. C.

*Decree on Bill of Interpleader.*

## SUPREME JUDICIAL COURT.

SUFFOLK—SS.

C. G. L., Executor,	}	IN EQUITY.
va.		
I. T. et al.		

This cause coming on to be heard, it appeared that the said Israel Thorndike the elder by his last will directed his executors, of whom the complainant [plaintiff] is the survivor, to place the sum of twenty thousand dollars in the office of the Massachusetts Hospital Life Insurance Company in trust, to receive the income and pay it annually to his son Andrew Thorndike during his life, and at his decease to take up the sum and pay it to the heirs-at-law of the said Andrew; that said deposit was made, and the income paid to the said Andrew during his life; that upon his decease, Israel Thorndike, a brother of the said Andrew, brought his action at law against the said executors, claiming one-sixth part of said fund as one of the heirs-at-law of the said Andrew; that thereupon the said complainant [plaintiff] filed his bill and amended bills in equity against the said Israel and other persons, who would be the heirs-at-law of the said Andrew if he had died unmarried and without lawful issue; and also against Katharina Bayerl Thorndike, claiming to be the lawful widow of the said Andrew; and against Andreas Thorndike and Anna Loring Thorndike, infants, claiming to be the lawful issue and heirs-at-law of the said Andrew, praying that the said Israel might be enjoined from prosecuting the said suit at law, and that the several parties might interplead and present their respective claims for the consideration and determination of the court; and thereupon the said parties did appear by their respective counsel and guardians, and proofs being taken and read, and upon arguments of counsel, it was considered and now adjudged and decreed [declared] that the said Andreas Thorndike and Anna Loring Thorndike are both children of the said Andrew, begotten upon the body of the said Katharina, before marriage; that afterwards the said Andrew was duly and lawfully married to the said Katharina, lived with her as his lawful wife, and openly and publicly acknowledged the said Andreas and Anna Loring to be his children and heirs-at-law; that by reason thereof they are entitled under the will of the said Israel Thorndike the elder to the said sum of money to be divided between them in equal shares; and that the said Katharina is not entitled to any part thereof; and that the other defendants are not entitled.

And it appearing to the court by the statement of the said complainant [plaintiff] that he holds the sum of twenty thousand seven hundred and forty-five dollars and twenty-seven cents subject to the order and direction of the court:— It is further ordered and decreed that he do pay to the solicitors, F. C. L., C. W. L. and A. D., their costs of counsel fees to be taxed as between solicitor and client, and that the residue thereof be paid one-half part to J. G., guardian of the said Andreas Thorndike, and one-half part

to W. I. B., guardian of the said Anna Loring Thorndike; and that the bill be dismissed as to the other defendants without costs.

By the order of the P. M., Esq.,

One of the Justices of the said Court.

March 30, 1963.

G. C. W., Clerk.

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### *Decree of Dismissal of Bill.*

This cause coming on, etc., this court doth order that the plaintiff's bill do stand dismissed out of this court [if there are other defendants who do not appear, or if dismissed against one of several defendants — as against the defendant B.], with costs to be paid by the plaintiff A. to the said defendant B., and to be taxed by the, etc. [in case the parties differ].

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### *Decree of Dismissal With Costs; Stating Reasons.*

The bill charging the defendants with combining and confederating to wrong and defraud the plaintiffs, as assignees of the estate of the said Joseph Winsor, by making unjust claims against said insolvent and obtaining payments by preferences contrary to the provisions of the insolvent laws of Massachusetts, all the material allegations thereof being denied, the evidence of the respective parties being duly taken and published, and the cause brought to hearing, and having been fully argued by counsel,—it is considered, adjudged and decreed by the court here that the claims and demands set up by the defendants in their respective answers, as due from said insolvent, were just and true claims and demands, and that the payment thereof at the times and in the manner set forth in said answers, and as proved, was not made in violation of the said insolvent laws; and thereupon the said bill, after full hearing upon the merits of the cause, is adjudged and decreed by the court to be dismissed with costs for the defendants.

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### *Decree of Dismissal Without Prejudice; Stating Reasons.*

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed by the court that the plaintiff is entitled to no specific lien or security upon either of the vessels mentioned in the plaintiff's bill, and has no equity to be relieved in respect thereof, and that his bill be dismissed with costs to the defendants, without prejudice to his right to come in and receive a dividend of the said R.'s estate in common with the other creditors of the said estate.

*Decree of Dismissal Framed to Prevent Prejudice.*

## SUPREME COURT OF UNITED STATES.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of —, and was argued by counsel; on consideration whereof this court is of opinion that the decree of the circuit court ought to have shown that the bill was dismissed because the deed therein mentioned, being void at law for matter apparent on its face, the plaintiff had not shown any circumstances which disclosed a case proper for the interference of a court of equity to relieve against such void deed. And this court is further of opinion that so much of the said decree as dismisses the bill with costs is erroneous, and ought to be reversed. This court doth therefore reverse and annul the said decree, and direct that the case be remanded to the said circuit court with directions to modify the same according to the principles of this decree.

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*Order Adjudging Party Guilty of Contempt.*

[Title.]

A motion for attachment for contempt herein having come on for further hearing on the question of punishment or terms, on this 18th day of February, 1880, and Charles F. Blake, Esq., having been heard for the motion, and J. H. Whitelegge, Esq., opposed: — Now, therefore, it is hereby ordered and decreed that the defendant is adjudged to have committed the contempt alleged, and that he pay, as a fine therefor, the amount of all costs, charges and disbursements whatsoever suffered, borne or incurred by the complainant by reason of, or on account of, the said motion, and that the question of the amount of said fine be submitted to this court on affidavits and without argument, as follows: — The complainant to serve his affidavits on the solicitor for the defendant on or before Friday, February 20, 1880; that defendant serve his replying affidavits on counsel for complainant on or before Tuesday, February 24, 1880; and that complainant have the right to reply; and that all affidavits be filed on or before Friday, February 27, 1880.

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*Order Fining Defendant for Contempt.*

[Title.]

This motion having been heard on the 1st day of August, 1879, on affidavits and argument by counsel for the respective parties, and thereupon an order having been duly made that it be referred to John A. Shields to ascertain the fact of said infringement, if the same be so, and report his finding to this court, and upon the coming in of the report of said referee, and hearing counsel for the respective parties, in support thereof and in opposition thereto, said report was confirmed; and it was then further ordered that the complainant file with the court and serve copies on defendant, affidavits showing the expenses incurred in the prosecution of this

second attachment for contempt; that defendant file and serve answering affidavits, and that complainant may reply thereto; and an amended order and the affidavit of George Hayes, the defendant, executed on the 26th day of February, 1880, having been filed in reply to said complainant's affidavits, it is, upon consideration thereof, ordered that the defendant pay into court the sum of \$522.49, as set forth in the affidavit of Baron Higham, executed herein on the 16th day of February, 1880, and the further sum of \$367.50, as set forth in the affidavit of Valentine Fisher, executed herein on the 20th of February, 1880, amounting altogether to the sum of \$1,889.99, as a fine for said second contempt, within thirty days from the date of the entry of this order, to wit, the 12th day of April, 1880; and that if not paid the defendant stand committed till it be paid, and that when paid it be paid over to the plaintiff in reimbursement.

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*Appeal and Allowance.*

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF NEW YORK.

JOHN JONES, Plaintiff, Appellant,  
vs.  
RICHARD ROE, Defendant, Respondent.

The above-named plaintiff, John Jones, conceiving himself aggrieved by the order entered on December 8, 1880, in the above-entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States, and he prays that this his appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

RICHARD STANTON,  
Attorney for Plaintiff and Appellant, John Jones,  
280 Broadway, New York, N. Y.

New York, December 17, 1880.

And now, to wit, on December 18, 1880, it is ordered that the appeal be allowed as prayed for.

E. HENRY LACOMBE,  
Circuit Judge.

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*Citation on Appeal.*

UNITED STATES OF AMERICA — vs.

To Richard Roe, GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the — day of —,\* pursuant to an appeal, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein John Jones is appellant and Richard Roe is respondent, to show cause, if any

\*See S. C. Rules 8 and 9.

there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, chief justice of the United States, this 18th day of December, in the year of our Lord 1889.

E. HENRY LACOMBE, Circuit Judge.

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*Certificate by Clerk Under United States Supreme Court Rule 9.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT.

NORTHERN PACIFIC RAILROAD COM- PANY, Plaintiff in Error,	}
vs.	
DOMINICK AMATO, Defendant in Error.	

UNITED STATES OF AMERICA, Second Circuit, City of New York.	}	ss.

I, John A. Shields, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that on the 25th day of January, 1892, an order was entered herein by the circuit court of appeals for the second circuit, directing a mandate to issue to the circuit court of the United States for the southern district of New York, affirming a judgment of said circuit court entered in the clerk's office of said court on the 28th day of May, 1891; and that on the 28th day of January, 1892, a writ of error for the review of said order by the Supreme Court of the United States was duly sued out by the Northern Pacific Railroad Company, and allowed by the Honorable E. Henry Lacombe, circuit judge, and issued from the clerk's office of the United States circuit court of appeals for the second circuit, which writ of error was returnable in the Supreme Court of the United States on February 25, 1892; that on or about the same day a bond as security for the costs upon said writ of error and a citation for the said return day were duly approved and signed by the said circuit judge, which writ of error, citation and bond were duly served on the attorney for the defendant in error on January 29, 1892.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the second circuit, this 27th day of February, in the year of our Lord 1892, and of the independence of the said United States the one hundred and sixteenth.

JOHN A. SHIELDS, Clerk.

*Supersedeas Bond.*CIRCUIT COURT OF THE UNITED STATES OF AMERICA FOR  
THE SOUTHERN DISTRICT OF NEW YORK, IN THE SECOND  
CIRCUIT.

JOHN JONES, Appellant, }  
                                   vs. }  
 RICHARD ROE, Respondent. }

*Know all men by these presents*, that we, John Jones and Abner Whiting, both of the city, county and State of New York, are held and firmly bound unto the above-named Richard Roe in the sum of two hundred and fifty dollars, to be paid to the said Richard Roe, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals and dated the 18th day of December, in the year of our Lord 1889.

Whereas, the above-named John Jones has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:—

Now, therefore, the condition of this obligation is such that if the above-named John Jones shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN JONES. [L. S.]

ABNER WHITING. [L. S.]

Sealed and delivered, and taken and acknowledged, this 18th day of December, 1889, before me,

JOHN A. SHIELDS, U. S. Commissioner.

Approved by E. HENRY LACOMBE,

Circuit Judge.

*Motion to Dismiss or to Affirm.*IN THE SUPREME COURT OF THE UNITED STATES—OCTOBER  
TERM, 1891.

BENJAMIN H. TATEM, JOHN C. CURTIN  
     and WILLIAM G. BAILEY, Exec-  
     utors of WALTER F. CHADWICK,  
     Deceased, and NORMA D. CHAD-  
     WICK, Appellants,

888.

vs.

ALTHA CHADWICK.

Comes now the appellee, by her counsel appearing in that behalf, and moves the court to dismiss the appeal in the above-entitled cause for want



of jurisdiction because the judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to wit, the Supreme Court of the State of Montana.

And the said appellee, by counsel as aforesaid, also moves the court to affirm the said judgment or decree from which said appeal purports to have been taken, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only.

HENRY E. DAVIS,

Counsel for Appellee for the Purposes of These Motions.

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*Notice of Submission of Motions to Dismiss and to Affirm.*

IN THE SUPREME COURT OF THE UNITED STATES — OCTOBER TERM, 1891.

No. 888.

*To Messrs. Martin F. Morris and J. C. Robinson, Counsel for Appellants:*

Please take notice that on Monday, the 14th day of December, A. D. 1891, at the opening of the court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies will be submitted to the Supreme Court of the United States for the decision of the said court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

HENRY E. DAVIS,

Counsel for the Appellee for the Purposes of the Motions.

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*Writ of Error to State Court.*

UNITED STATES OF AMERICA — SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, *To the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts*, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court of the Commonwealth of Massachusetts before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Doe and Richard Roe, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity: or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the

title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission,—a manifest error hath happened, to the great damage of the said Richard Roe, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the — day of —, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, chief justice of the said Supreme Court, the 18th day of December, in the year of our Lord 1889.

JAMES HALL MCKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

HORACE GRAY, Justice.

### *Mandate.*

UNITED STATES OF AMERICA — SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, *To the President of the Senate of the State of New York, the Senators, Chancellor and Justices of the Supreme Court of the said State, Being the Judges of the Court for the Trial of Impeachments and Correction of Errors, Holden in and for the said State of New York, GREETING:*

“Whereas, lately, in the court for the trial of impeachments and correction of errors, holden in and for the State of New York, before you, or some of you, in a cause between Charles A. Davis, plaintiff in error, and Isaac Packard, Henry Diadler and William Morphy, defendants in error, the judgment of the said court for the trial of impeachments and corrections of errors was in the following words, to wit:— ‘Therefore it is considered by the said court for the correction of errors that the judgment of the Supreme Court aforesaid be, and the same is hereby, in all things affirmed. It is further considered that the said defendants in error recover, against the plaintiffs in error, their double costs, according to the statute in such case made and provided, to be taxed in defending the writ of error in this cause, and also interest on the amount recovered, by way of damages,’ as by the inspection of the transcript of the record of the said court for the trial of impeachments and correction of errors, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord 1888, the said cause came on to be heard before the said Supreme

Court, on the said transcript of the record, and was argued by counsel; on consideration whereof it is the opinion of this court that the plaintiff in error, being consul-general of the king of Saxony, exempted him from being sued in the State court; by reason whereof, the judgment rendered by the court for the trial of impeachments and correction of errors is erroneous. Whereupon it is ordered and adjudged, by this court that the judgment of the said court for the trial of impeachments and correction of errors be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said court, with directions to conform its judgment to the opinion of this court.

"You, therefore, are hereby commanded that such further proceedings be had in said cause as according to right and justice, and in conformity to the opinion and judgment of said Supreme Court of the United States, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

"Witness the Honorable John Marshall, chief justice of said Supreme Court, the second Monday of January in the year of our Lord 1838.

"WILLIAM THOMAS CARROLL,

"Clerk of the Supreme Court of the United States."

## **GENERAL INDEX.**



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